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PANAMA CANAL TREATY

(DISPOSITION OF UNITED STATES TERRITORY)

HEARINGS
BEFORE THE
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
FIRST SESSION

PART 3

SEPTEMBER 8; OCTOBER 13 AND 28;
NOVEMBER 3 AND 15, 1977

Printed for the use of the Committee on the Judiciary

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PANAMA CANAL TREATY

(DISPOSITION OF UNITED STATES TERRITORY)

PART 3

THURSDAY, SEPTEMBER 8, 1977

U.S. Senate,
Subcommittee on Separation of Powers,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 1318, Dirksen Senate Office Building, Hon. James B. Allen of Alabama (chairman of the subcommittee) presiding.

Present: Senators Scott of Virginia and Hatch of Utah.

Also present: Senator Jesse Helms of North Carolina.

Staff present: Quentin Crommelin, chief counsel and staff director; Dr. James McClellan, professional staff (minority); Paul Guller, editorial director; and Melinda Campbell, chief clerk.

OPENING STATEMENT OF CHAIRMAN ALLEN

Senator **Allen**. The committee will please come to order.

The Subcommittee on Separation of Powers of the Judiciary Committee is convened this morning to continue the subcommittee's investigation of constitutional issues arising out of the new proposed Panama Canal Treaties. I am certain that most of those present this morning are aware of the central constitutional issue under investigation; however, perhaps I should again reiterate the proposition which is the focal point of this inquiry.

Article IV, section 3, of the Constitution of the United States provides that Congress "shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The power given to Congress in that clause appears to be exclusive and, if it is an exclusive power, then the Executive is prohibited from entering into a treaty disposing of U.S. territory except with express congressional authorization; that is, statutory authorization by both Houses of Congress in addition to separate Senate approval through the treaty ratification process.

Additionally, members of the subcommittee are also deeply concerned that the executive department has reached certain financial agreements with the Panamanians for substantial financial assistance outside of the context of the provisions of the treaty itself. These financial agreements, if not embodied in the treaty, will not be subjected to the normal treaty ratification process which would otherwise be the case.

The subcommittee has further learned that the congressional appropriations process itself may in large measure be circumvented in the implementation of proposed financial arrangements with Panama but that, nevertheless, substantial sums of money are proposed to be made available to Panama by unilateral executive branch action. The subcommittee will therefore diligently continue to seek testimony on the full intentions of the executive department with respect to separately negotiated financial and banking arrangements with the Republic of Panama.

EXECUTIVE AGREEMENTS

Finally, in continuing its work, the subcommittee will seek to determine the extent to which the operative provisions of the executive department proposal are embodied in the executive agreements rather than in actual treaty language. There are, of course, in fact two treaties: the proposed Panama Canal Treaty itself and an additional treaty which purports to provide for the neutrality of the Panama Canal. Unfortunately, these treaties are in no way to be construed as the whole agreement.

Both treaties are accompanied by very lengthy executive agreements which actually contain the substance of the deal struck with Panama. These executive agreements, once implemented, would be subject to renegotiation and revision—and we find this astonishing—every 2 years.

This subcommittee, I am sure, shares a concern of many that Congress will relinquish forever any control over this country's relation with the Republic of Panama if the executive department is authorized to enter into a plenary relation with Panama based not, in reality, on treaty law but rather based on executive agreements authorized by treaty law but subject to change at the whim of the Executive. In short, the subcommittee wishes to establish by its inquiry the extent to which the Executive would be given a blank check by the new proposed treaties to amend, interpret, abrogate, or replace entirely the lengthy accompanying substantive executive agreements.

I have just returned from Alabama where in the course of the August recess I met with citizens in 37 counties. These meetings were held in most instances at the county courthouses; they were widely announced and well attended. One topic was invariably raised. Notwithstanding drought, unemployment, inflation, high energy prices, low farm prices, and a host of other subjects which could easily have been foremost in mind, virtually every group I encountered wished to know the answer to one question: Would the United States, in fact, give away the Panama Canal Zone? Of the thousands I spoke with, almost no one favored a policy of surrender in Panama.

Many are saying that the people need education and that with education they will come to support the giveaway of the American canal in Panama. In my judgment, the true state of affairs is the exact opposite. Further knowledge will only strengthen the resolve of the people; and, in my judgment, our all-wise Federal Establishment could itself well stand some education from the American citizen who has the wisdom to see the obvious fact that the Panama Canal is vital to the economic stability and military security of the United States, from the American citizen who has the commonsense to recognize the lunacy of paying billions to an unstable pro-Marxist dictatorship for taking over billions in property belonging to the United States. from the American citizen who has the clarity of thought to see the reality behind the sham and the traveling medicine show that has passed for an open discussion of the actual provisions of this proposed new arrangement with Panama.

Perhaps, however, Americans do need education in the fine points of the Panama Canal treaties. That education has been hard to come by of late because throughout the treaty negotiations a veil of secrecy prevented any useful information being made available either to the public or, in large measure, to the Congress. Perfunctory briefings containing no real substance and seeking no advice, to be sure, were conducted. However, until yesterday most of the information this subcommittee has been able to obtain on the new treaty has come from translations of speeches made by the Panamanian negotiators in Panama.

$2.262 BILLION IN CASH PAYMENTS

By that method we have learned that the Panamanians expect to receive during the next 22 years at least $2.262 billion in cash payments from the United States. The Department of the Treasury, when its representative testified before this subcommittee was apparently unable to advise the committee of any negotiations whatsoever with Panama, yet we could read from translated Panamanian documents that the Export-Import Bank plans to lend Panama $200 million, that the Agency for International Development is to guarantee—and no doubt pay off—housing loans in the amount of $75 million, and that the U.S. Overseas Private Investment Corporation is to guarantee $20 million in loans for a new Panamanian development bank—everyone else has a bank in Panama, why should not the Panamanians?

Finally, the committee has learned—not from the Department of Defense, but from the Panamanians—that $50 million in military aid would be provided to prop up and guarantee the continuance of the military dictatorship now oppressing the people of the Republic of Panama.

But now that the proposed Panama Canal Treaty and Neutrality Treaty have finally been made public—and it has been signed by the President and the Panamanian dictator—there are disclosed even more items about which the American citizen should be educated. The American citizen should learn that in addition to all the other massive payments to be made to the Republic of Panama, as the ultimate insult, it is proposed that we pay to the Republic of Panama $10 million a year for providing police services within the territory which would be ceded to Panama. We trust that during his education the American citizen will share our own disbelief and outrage that our great country proposes to cede United States territory to Panama and then to pay Panama for performing the normal functions of government within that same land.

FOUR U.S. MILITARY BASES TO REMAIN IN CANAL ZONE

We hope, too, that the American citizen will soon learn that out of 14 military bases now in the Canal Zone, only 4 would remain after implementation of this treaty and that the 4 retained bases would be under direct Panamanian civil and political jurisdiction, subjecting thereby our Armed Forces to the dictatorial rule of the present Panamanian Government. And although it is true that a status of forces agreement will provide some marginal protection to U.S. soldiers in the Canal Zone, the American citizen should learn that in essence our forces will be made subject to a code of laws based on the autocratic rule of one man and devoid of any constitutional safeguards even remotely resembling those previous American rights now enjoyed within the Canal Zone.

Yes, there is much to learn about this proposal. Does the average citizen now know that the American flag will not be permitted to be flown in a place of honor, even at our military installations, and, according to the speeches of the Panamanian negotiators, will be permitted at our own bases only when inside and when displayed jointly with a Panamanian flag in the position of honor. Perhaps this latter point is trivial, but it typifies this entire proposed agreement: Our flag in a broom closet and our vital canal at the mercy of a banana republic.

So, the Subcommittee of Separation of Powers does intend to continue its investigation of these issues to insure that all the facts are made available both to the Congress and to the people. We will be, I am sure, greatly aided in our efforts by the witnesses scheduled to appear at today's hearings.

Senator Hatch, do you have an opening statement?

Senator HATCH. Thank you, Mr. Chairman. I do not have a prepared statement. But I would like to say that, when I first examined the Panama Canal issue, I was eager to learn about the reasons for this treaty. I listened to Ambassador Bunker once and to Ambassador Linowitz a number of times. I read everything I could get my hands on. I did everything I could to look at all of the arguments in an objective manner.

This morning I read in the New York Times an editorial asserting that there has not been one substantive argument offered against the treaty. I think this is typical of irresponsible journalism in today's world. We have heard many, many responsible, carefully reasoned, substantive arguments against this treaty right in these hearings.

Last evening I met with one of the most knowledgeable men in America, a man who knows a lot about foreign policy and foreign affairs. He had not even heard of the constitutional issues and arguments that have been raised in connection with this treaty. I think it is deplorable that the press has ignored the serious constitutional problem created by this treaty. Everybody in the House of Representatives who has any constitutional understanding at all knows that the House is being bypassed in contravention of the Constitution of the United States.

In article IV, section 3, clause 2 it says that the transfer of American property requires the consent of both Houses of Congress.

Here is a situation where this provision of the Constitution is being subverted. Briefs prepared by the American Law Division of Congressional Research Service do not support the State Department's position. There has not been one valid precedent presented by the State Department supporting the President's extraordinary exercise of power. Even these briefs indicate that.

Yet we have had hardly a responsible report on this crucial topic in the American press or news media.

The second constitutional issue—and I think it is important to know this—that is being circumvented here is that all appropriations bills have to originate in the House of Representatives. It is specifically mandated by the Constitution. A treaty cannot appropriate funds. The Senate itself, as evidenced by our last session, just prior to the ending thereof, acknowledged that with great pomp and circumstance on the Senate floor.

Here we are entering into a treaty that is going to place a monumental burden upon the taxpayers of America. It has been suggested by the proponents of the treaties that the tolls will take care of everything. There is the misrepresentation that the tolls can cover all the payments to Panama under these treaties—about $70 million a year. Last year we operated at a $7.2 million deficit. How are the tolls going to pay for these increases unless Panama escalates them to such a degree that every country in Latin America is going to be seriously injured?

Every country that uses the canal, including our own and excepting Panama, which always has gotten to use the canal free, is going to be injured. I think it is important to note that we are going to be paying these moneys permitted by a State Department approach here without ever going to the House of Representatives, not only for the permission to transfer $7 to $12 billion—and that is what we have had in testimony before this subcommittee—of American property. The House of Representatives is not even being asked whether they have any interest in the matter. The administration intends to bypass the House and deal only with the Senate.

In addition, we are going to give a total of about $2.25 billion more in cash payments up to the end of this century. Payments will include $350 million in loans, military aid, and other payments almost immediately. Then we will also guarantee $70 million a year to the Panamanians to be taken from canal revenue. The only way those moneys could be raised in addition to assimilating the Panamanians into the operation of the canal—which should be done—is either to drastically increase the tolls or to underwrite the whole giveaway with American taxpayer dollars.

These constitutional issues indicate another overreaching, overextension beyond the separation-of-powers doctrine provided in the Constitution by the executive branch of Government, through the State Department, to the detriment of the Congress and the Constitution.

I think this matter is so crucial that everybody in America ought to know about it. I think that ultimately the Supreme Court will be called upon to support the Congress in this constitutional struggle.

I might also mention that I think that most of the problems we have in this world today are caused by an elitist foreign policy philosophy that has dominated American for too long. It is an elitist philosophy that has made us appear to the world as imperialist colonializers, when the Soviet Union, the greatest imperialist colonializer in the history of the world, controls and dominates colonies all over the world. If the Soviet Union receives any criticism at all from the world, you would never know it from reading the newspapers or viewing television newscasts.

Now we are in the posture of being imperialist colonializers who give up everything—this time the Panama Canal.

Another major foreign policy development that concerns me, is this Presidential release memorandum No. 10, which has indicated that we will use the force of world opinion rather than military aid and assistance to stop world aggression to protect not only Europe but also Korea.

This is the type of State Department foreign policy to which this country is subjected.

The fact of the matter is, as a result of the diplomatic blunders involved in this treaty, we are going to have trouble no matter what we do. If we fail to ratify the treaty and the President does not act firmly and responsibly and expeditiously, we know there will be incidents and difficulties down there. We were also told in Panama that, if we do ratify it, within a short period of time we will probably be shut off from the use of the canal.

We appreciate the witnesses that have come before us in the past. We certainly appreciate those that are here today. I shall be very interested in listening to everything that is said here today.

Senator ALLEN. Senator Scott?

Senator SCOTT. Thank you, Mr. Chairman.

I would commend you, Mr. Chairman, for holding these hearings and for the caliber of witness that we have appearing before us today and in the past.

I do not have a prepared statement. I would like to say that the proponents of the treaty speak of fairness. I believe this is a good word. I think it is a word that we should remember as we examine this treaty.

In the basic laws of contracts, we learn about consideration. We learn about mutuality. There should be benefits flowing in both directions. I do not find this to be true in an examination of the treaty. It seems to be going one way—away from the United States and to Panama.

Article 12 of the canal treaty, for example, forbids us from building a new canal anywhere in the isthmus without the consent of Panama, well outside of their territorial limits. I see no benefit to the United States, no quid pro quo there. It just seems to me that, in the interest of fairness to our own Government as well as to Panama, we should look very carefully at every provision of this treaty.

Again, I comment the chairman for what he is doing.

Senator ALLEN. Thank you very much, Senator Scott and Senator Hatch.

Our first witness is a man who was one of the first to alert the country to the dangers of the proposed Panama Canal Treaty. He has articulated in a most eloquent fashion throughout the Nation the dangers underlying the treaty. We are very pleased that he is here today with his lovely wife Nancy.

He is to be presented to the committee and to those present by Senator Hayakawa, the distinguished Senator from California.

TESTIMONY OF HON. S. I. HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Mr. Chairman, it certainly is a great pleasure to be here to introduce Ronald Reagan, former Governor of California.

He and I have been associated for a long time. I guess we both got acquainted with each other best of all during the days of the student uproar in 1967–68 and so on. From the point of view of the radical students, he was one of their most unfavorite people. I think he was, from their point of view, Fascist pig No. 1 in California. [Laughter.]

Thereafter, through a whole chain of circumstances, I was appointed, with his assistance, acting president of San Francisco State College. At that time I became not only Governor Reagan's puppet, but Fascist pig No. 2. [Laughter.]

So, we have had a kind of paternal relationship over the years. I want to say right here that we did succeed in producing some kind of order at San Francisco State College which spread to other colleges. In all of that, I owe Governor Reagan a great debt of gratitude.

As you have said, Mr. Chairman, he has been in the forefront of explaining the Panama Canal treaties and the dangers involved therein in eloquent and impassioned terms. He brought the issue home to an awful lot of people. This results in one terrific stack of mail on my desk; I owe that to him, too.

So, it is with great pride and pleasure that I introduce my good friend Ronald Reagan.

Senator ALLEN. Thank you very much, Senator Hayakawa. I would urge you to stay and listen to the Governor. I think possibly your thinking in this matter might be assisted by the Governor's remarks. [Laughter.]

We are delighted to have you, Governor Reagan.

Senator SCOTT. Mr. Chairman, might I say that we are also glad that the Governor's wife can be with him.

TESTIMONY OF HON. RONALD REAGAN, FORMER GOVERNOR OF THE STATE OF CALIFORNIA

Governor REAGAN. Mr. Chairman and members of the subcommittee and Senator Hayakawa, let me express my gratitude for Senator Hayakawa so graciously coming and introducing me here. It is true that we shared some battles together.

I could also say in his behalf that he followed a succession of acting presidents of San Francisco State in those hectic days, all of whom suffered combat fatigue until he arrived. At that time, the fatigue was transferred to the rioters and disturbers; and the people of California are very grateful to him for what he did; so am I.

Mr. Chairman and members of the subcommittee, thank you for inviting me to appear before you this morning to testify. You are concerned, as I am, with constitutional and other issues arising out of the proposed Panama Canal treaties, and I appreciate this opportunity to share my views with you.

It is necessary first to comment on the constitutional issue. Even though I am not a lawyer myself, I can appreciate the hours of research lawyers put into these matters. In reading about the Panama Canal, its history and its operation, as well as its national and international significance, I found myself spending more and more of my time studying the legal cases and opinions which bear on the canal and our relations with Panama. There is a plentiful supply of logic and common sense in those cases and opinions.

The executive branch argues that the President's treaty-making powers under the Constitution are enough to dispose of U.S. territory and property without any implementing legislation by the Congress, and that transfers of property as specified in a treaty become self-executing once the Senate ratifies the treaty. Historically, Congress has held to a different view, though there have been enough ambiguities over the years to revive the argument with each new case.

At a glance, the U.S. Constitution does seem to be ambiguous about the matter: article II, section 2, clause 2 gives the President authority to negotiate and enter into treaties.

Article VI, section 2 declares that treaties are the supreme law of the land.

But, the Constitution also places a congressional act and a treaty on the same footing.

Article IV, section 3, clause 2 grants "The Congress," meaning both houses, the power to dispose of territory and other federal property.

Treaties, of course, must not be in violation of the Constitution which grants various powers to the President, the Congress, and the States. All of these, at face value, are limited, but in reality they are subject to the limitations imposed by other sections of the Constitution, in the form of specific prohibitions, or by the fact that the Constitution vests concurrent or exclusive power in certain units of the Government.

Whether the proposed Panama Canal treaty needs implementing legislation in order to dispose of U.S. property lies in this question of "concurrent" versus "exclusive" power.

In his recent paper titled "The Treaty Power and Congressional Power in Conflict: Cession of U.S. Property in the Canal Zone to Panama," Kenneth Merin, Legislative Attorney of the American Law Division of the Library of Congress, makes the point that, "The Constitutional issue is not, or should not be, involvement of the House of Representatives in treaty negotiations," but "whether, by virtue of article IV, Congress exercises exclusive or concurrent power over the disposal of territory and property."

Presumably, if it could be proved that Congress' power is concurrent, the proposed Panama Canal treaties would be complete and self-executing if ratified by the Senate. If, on the other hand, the weight of the evidence is for the other view—that the Congress holds exclusive power over the disposal of territory and property—then Senate ratification is not enough. Implementing legislation by the House of Representatives would be required. I believe that careful examination of legal cases as well as historical precedent leads one to the inevitable conclusion that Congress does hold exclusive power and that implementing legislation will be needed in the case of the Panama Canal treaties.

Now, the executive branch may cite as evidence to support its position the treaties we entered into in the last century with a number of Indian tribes. In these treaties we appeared to be ceding land to the tribes without requiring implementing legislation. The practice was stopped altogether more than a century ago with the passage of the Indian Appropriations Act of 1872, but a closer look at the Indian land treaties shows they were very different from this proposal to turn over U.S. property in the Canal Zone to a foreign government.

The American Indian tribes have always had a unique relationship with the Federal Government and have not been considered foreign nations. When lands were turned over, the tribes were usually given "right of occupancy," with ultimate authority over the lands still to be held by the Federal Government. Even in cases where the treaties gave the tribes the land in fee simple, the Government reserved the right of eminent domain and sometimes the right to hold veto power over transfer of the land to third parties. Neither of these reservations would apply, of course, when turning property over to a foreign nation, such as Panama.

Other arguments will be put forward to support the contention that implementing legislation is not needed in order to dispose of our property in the Canal Zone. One may have to do with treaties which involved boundary claims. The United States has entered into boundary settlement treaties several times in its history, swapping pieces of land here and there without any implementing legislation from Congress. Again, on closer examination, each settlement of a boundary dispute turns out to have been a matter of recognition of the rightness of the claim of our Nation or the other one involved, and not a matter of outright cession of territory.

RYUKYU ISLANDS

The case of the Ryukyu Islands might be cited, too. We turned these islands back to Japan in 1972, following ratification of a treaty without implementing legislation. In the 1951 peace treaty with Japan, however, the Japanese did not renounce their right or title to the Ryukyus, as they did to certain other pieces of territory; so that when the time came to discuss the matter further there was no serious question of ownership.

So much for the flaws in the arguments that are put forth to support the idea that the new Panama Canal treaties can be used to turn over U.S. property without special implementing legislation. The strongest evidence to support the opposite assertion is the past record of disposal of U.S. property in the Canal Zone itself.

I have read thousands of words of newspaper and magazine copy and heard many television and radio broadcasts about the Panama Canal treaty issue, but have seen or heard nothing about these cases in the news media. Yet, their significance cannot be underestimated in establishing that legislation will be required of Congress because of its exclusive power to dispose of territory and property.

Back in 1932, our government wanted to build a new legation building on land inside the Canal Zone. It is not proper, of course, to build a legation on one's own territory. So, a bill was passed by Congress to authorize the Secretary of State to adjust the boundary between the

Canal Zone and the Republic of Panama in order to turn the land for the legation building over to Panama.

Ten years later, the Senate debated approval by joint resolution of an Executive agreement to transfer some land and property in the Canal Zone to Panama. The very question of whether this should be done by treaty—requiring only Senate ratification—or by Executive agreement—requiring consent of both houses—was hotly debated. The measure was approved, underscoring Congress article IV powers.

Early the next year, 1943, the House Committee on Foreign Affairs held hearings on the land transfer in question. Its report adds weight to the argument for requiring implementing legislation in the current case. It said,

> Congressional approval of the Executive commitments to Panama is sought in the form of legislation because there is involved: a., a disposition of property of the United States; and, b., an appropriation of funds, both requiring an exercise of the legislative power, independently of the treatymaking power. Article IV of the Constitution provides that "The Congress shall have the power to dispose of the territory or other property belonging to the United States."

Our 1955 treaty with Panama provided for transfer of real property, stating that some would be transferred immediately and the rest with congressional authorization. During the hearings on the treaty, however, a State Department representative testified that the legislation would be needed in order to implement the transfer of all the property in question.

A number of Supreme Court decisions over the years has reaffirmed the exclusive nature of Congress power to dispose of territory and property under article IV of the Constitution.

In the face of all the historical and legal evidence indicating that implementing legislation from the Congress will be necessary in the case of U.S. property in the Canal Zone, it is hard for me to believe that the executive branch would want to circumvent the Congress rights and responsibilities in this matter. If our foreign policy is to be fully effective, cooperation of the Congress is a vital ingredient.

BRIEFED BY AMBASSADORS BUNKER AND LINOWITZ

The constitutional issue is of great importance, but so is the security of the United States and Western Hemisphere.

I have not yet received a copy of the treaty draft to read, but members of my staff and I have been briefed on its contents by Ambassadors Bunker and Linowitz and other members of the U.S. negotiating team. I believe the ambassadors worked earnestly and hard under difficult circumstances and there are some commendable ideas contained in the proposed treaties. But, I also believe they have an overriding, indeed, a fatal—flaw. They proceed from a false premise, that we can expect reliable, impartial, trouble-free, secure operations of the canal in the future by relinquishing the rights we acquired in the 1903 treaty.

In that treaty we acquired the rights of sovereignty over the Canal Zone, to the exclusion of the exercise of such rights by the Republic of Panama.

We did not acquire the Canal Zone under the same circumstances as we did the Louisiana Purchase or Alaska. Many people think we did, but the fact is that the Canal Zone is unique.

It seems clear, from the language of the 1903 treaty, that the intention of our Government was to acquire a firm, unshakable legal basis, for building, operating and defending the canal. We did not acquire the Canal Zone for the purpose of extracting minerals, tilling the soil or establishing a mercantile colony. It was a single purpose enterprise, but the important thing to remember is that only one nation can exert sovereign rights over a given piece of land at one time; and the 1903 treaty made it clear that we would do so in the Canal Zone and that the Republic of Panama would not.

To this day, it is those rights of sovereignty which undergird our ability to operate and defend the canal. We cannot be kicked out summarily on the whim of some Panamanian government.

NATIONALIZATION OF CANAL POSSIBLE

Once those rights are removed—and they will be removed immediately if the new treaties become effective—there is nothing to prevent a Panamanian regime from deciding one day to nationalize the canal and to demand that we leave immediately. That would present us with the very thing the treaty advocates say we want to avoid: confrontation, or its alternative, unceremonious withdrawal in the face of an arbitrary demand.

For more than 60 years we have operated the Panama Canal efficiently, impartially and on a not-for-profit basis. The nations of the Western Hemisphere have come to rely on our stable presence there to make sure that their commerce would get through unhindered.

We cannot be certain, if these new treaties go into operation, that key personnel now operating the canal will not leave a great deal sooner than expected, thus bringing into question the smooth operation of the canal. We cannot be certain that, as the American presence withdraws from the Canal Zone, new demands for accelerated withdrawal will not be made under threat of violence. We cannot be certain that outside influences hostile to hemispheric security will not make their presence felt much greater than before in Panama. We cannot be certain that Americans operating the canal will not be harassed by an unstable and power-hungry dictator.

Fidel Castro, whose interest in exporting revolution is well known, has made quite a show of his friendship for the current military regime in Panama. And, just this summer, a delegation from the Soviet Union visited Panama to look into trade, investigate possible plant locations and even the possibility of opening a bank in Panama. It should never surprise us that whenever the United States withdraws its presence or its strong interest from any area, the Soviets are ready, willing and often able to exploit the situation. Can we believe that the Panama Canal is any exception?

Although the proposed second treaty would continue indefinitely beyond the expiration of the first one in the year 2000, the question must be asked: Does it really provide what it says it will, which is the unilateral ability of the United States to step in to defend the canal if its neutrality is threatened?

I believe we will make a very grave mistake if we let ourselves be inveighed into debating what the treaties do or do not say. Yes, on paper, we are told we have the right to step in—even after we have turned over control and removed our forces. But will we?

We are told by the treaty advocates there will be unpleasantness and trouble if we don't accept these treaties. The same people then assure us we can march back in if there is trouble. But once we have said, in effect, "We don't want trouble; we'll give up the canal," have we not also said, "If the government of Panama, encouraged by leftist allies, plays fast and loose with the treaty," we'll decide—since we're giving it up anyway—"why bother?"

I don't believe such a concern is unjustified, given the recent history of our Nation. We have shown a reluctance to meet the responsibility of free world leadership, even on occasion to abandon allies.

We have been told the canal is declining in terms of military importance, and yet all but a handful of our Navy ships can transit the canal. The great bulk of material bound for our forces in Vietnam went by way of the canal. And who can say what shape our Navy will take 20 or 30 years from now? It may very well consist in this missile age of small, fast ships relying on quick accessibility from one ocean to another.

JOINT CHIEFS OF STAFF

President Carter cites a statement by the Joint Chiefs of Staff that the treaty is satisfactory in terms of our defense needs. I mean no disrespect to those fine men. Yet, in a recent letter to the President, four former Chiefs of Naval Operations—now retired and, therefore, free to speak out on this issue—underscored the importance of our keeping active control of the canal. Admirals Arleigh Burke, Thomas Moorer, Robert Carney, and George Anderson said, in part:

> As long as most of the world's combatant and commercial tonnage can transit through the canal, it offers inestimable strategic advantages to the United States, giving us maximum strength at minimum cost.
>
> By contrast, the Panama Canal, under control of a potential adversary, would become an immediate crucial problem and prove a serious weakness in the overall U.S. defense capability, with enormous consequences for evil.

Our continued presence at the canal inhibits potential adventurers from trying to make international trouble there far better than would a piece of paper granting us the right to return after we had once departed.

It is no secret that the Soviet Union believes control over some 16 vital sealane "choke points" means dominance of the world's oceans. Our presence at one of the busiest and most important of those "choke points" is a definite deterrent.

There is another factor at work which could be harmful to the security of the hemisphere because it could further question our willingness to maintain a leadership role. Let us remember that for much of the time while these treaties were being negotiated we were doing so—especially in the last 2 years—under repeated threats of violence. True, the threats slackened off this year, possibly because General Torrijos saw victory ahead. Some may believe the threats were a bluff, but the fact remains that we did continue to negotiate and, apparently, made concessions in the face of threats. The President seemed anxious to speed up and bring the matter to a conclusion in spite of his previous declarations that he would never relinquish effective control of the Canal.

If we accede to a treaty under such circumstances, will this mark the end of further demands? If there are, indeed, radical guerrillas in Panama—as we are told—ready to blow up the canal if we don't sign a treaty, what assurance do we have that they will be satisfied with the terms of these treaties? Already, the Government-sponsored student federation in Panama has issued a manifesto supporting the treaties, but also indicating that "the struggle will continue" so long as there is any American presence at the canal. If they should press Torrijos to ignore these treaties, would we not hear the same arguments from the same people for giving in to those new demands that we are hearing today?

Whether or not these treaties ever go into effect, we can expect trouble from leftist elements in Panama and elsewhere. Yes, failure to ratify the treaty will offer an excuse for demonstrations and riots in Panama and very possibly in the United States. And, behind the scenes, the Russian Bear will do all it can to destabilize the security of the hemisphere and cause a global whirlwind of unfavorable press aimed at us. It is not because we didn't ratify the treaty but because that is their normal procedure where we are concerned.

The treaty advocates say failure to ratify and implement these treaties will harm our relations with all of Latin America. Is it possible they believe they are betting on a sure thing? Historically, our Latin American neighbors have felt the need to be somewhat on guard against a United States which to them is the "Colossus of the North." A natural reaction has been to vote as a group on inter-American matters in international forums. This does not mean, however, that all Latin American nations have identical interests or think alike. As a matter of fact, a surprising number have privately expressed concern about our possible withdrawal from the canal.

Frankly, I believe we can question not only the warnings about possible deterioration in our relations with Latin America if we don't ratify the treaty, but also the glowing promises of a new era if we do.

U.S. LACKING COHERENT POLICY

The fact is we do not now have a coherent policy toward our Western Hemisphere neighbors. And we should because, over the next few decades, our continued prosperity—possibly even our survival—will be closely linked to that of our neighbors within this hemisphere. I do not believe these treaties are a substitute for such a policy. I do believe that the United States, negotiating from strength and not meekly yielding legitimate rights and responsibilities out of a desire to avoid unpleasantness, can be truly helpful to the people of Panama and to all the hemisphere.

Some of our neighbors need aid we are in a position to give. With others, the need is for increased technology and trade; and with some, unhindered access to capital for needed development. Once our Government recognizes that we must all sink or swim together maybe we'll stop some of our self-defeating practices. It is self-defeating to throttle a friendly nation's ability to obtain capital because it doesn't run its internal politics precisely as we would like. It is self-defeating to keep a neighbor from buying weapons for its police force because someone in Washington sees terrorists as mere political dissidents. Thus, we encourage more terrorism and hurt a Nation's chances for economic recovery.

Our neighbors in Latin America ask that we learn enough about them to have some understanding. Sometimes, their problems are similar, sometimes different but each nation is deserving of understanding.

What especially do the Panamanians want? That isn't an easy question to answer since there is no elected government, nor can we be sure a plebiscite of the people on the treaties would give an accurate answer, in view of the nature of the Government.

PANAMA HAS HIGHEST PER-CAPITA INCOME IN CENTRAL AMERICA

We are left with some educated guesses about the wants of the Panamanian people. Thanks in large part to the canal, the Panamanians have the highest per-capita income in Central America and the third or fourth highest in all of Latin America. But their economy is near bankruptcy. They are plagued by inflation and unemployment while natural resources lie undeveloped.

Contrary to what has been implied about my own position, I do not believe that in rejecting these treaties we should simply demand the status quo and not seek answers to problems regarding our relations with the people of Panama.

Early in this century, we realized our dream of a waterway connecting the two great oceans. Panama, then a neglected province of Colombia, also realized a dream—to be free and independent. The two dreams were interrelated. Many in our country thought the canal should be in Nicaragua. The Panamanians knew their only chance to have independence and prosperity lay in the canal being built in Panama. And so it was that Panama ratified the Hay-Bunau-Varilla Treaty months before it was ratified by our own Government.

We have nothing to be ashamed of and much to be proud of. We created one of the great wonders of the world, and it is doubtful any other nation could have done so. More than that, however, we have managed the canal fairly for all nations at no profit to ourselves and with great economic benefit to Panama. Not only did we deal fairly with the governments of Panama and Colombia, we also bought every piece of privately owned land in the Canal Zone in fee simple from the individual owners. And may I point out the Canal Zone is not flanked by Berlin walls. The people of Panama can go in and out of the zone freely at all times.

But times change and the Panamanians have a growing feeling of nationalism. We, on the other hand, cannot weaken our ability to provide security for our Nation and the entire Western Hemisphere. Can ways be found to satisfy some of their national aspirations without compromising our ability to meet security requirements?

Though I believe that the basic flaw of the proposed treaties requires that they not be ratified, there are alternatives we should examine.

Let us explore, for example, broadening participation in canal policymaking. The proposed basic treaty calls for a governing board with five United States and four Panamanian directors until the year 2000, when it expires. An alternative to consider would be a board comprised of a group of permanent U.S. seats, another group of permanent Panamanian seats and a third group of term seats to be rotated among canal-using nations. Another possibility might be to have that third group made up of representatives of our neighbors, the nations of North and South and Central America.

The proposed treaties call for an increase of the money we pay Panama annually from $2.3 million to an average income from canal operations of as much as $80 million. There is no assurance this would benefit the Panamanian people. A modernization program—the Terminal Lake Third Lock plan—could definitely help the people. It would be approximately 10 years in the building and cost between $1 and $2 billion. We could make certain that Panamanian workers and contractors were engaged extensively in the program which would directly benefit the people and the economy of Panama.

Such a modernization of the canal would make it capable of handling all but a few supertankers. It could have important implications for the cost of moving Alaskan oil to gulf coast refineries. Then, too, increased speed of transit and general traffic would mean increased toll revenues which could further benefit Panama through a sharing formula.

There are two alternatives for discussion. I am sure there are other ways for the United States to do what it can for a neighbor, without abdicating its own responsibility to permanently provide an open waterway for all the world's shipping and a guarantee of security for the Western Hemisphere.

FREEDOM HOUSE DATING

In conclusion, I would like to touch on the subject of human rights. The concept of individual human freedom is deeply ingrained in us here in the United States. Though I believe the best way to help human rights flourish elsewhere is to set the best possible example in our own country, I realize that some idealists believe we should be more assertive in getting others to follow our example. Now that a high standard of sensitivity to human rights has become a cornerstone of our Government's policy, I think it is not only fair but mandatory to raise the question with regard to the repressive regime in Panama with which we have been negotiating. And, I do not accept our negotiators' effort to characterize it as merely authoritarian.

Human rights criticism, public and private, has been leveled at a number of nations in the Western Hemisphere which have always been friendly toward us, yet I cannot recall a single word of criticism by any representative of our Government toward Panama in this regard. Yet, Freedom House, which is recognized internationally as an impartial monitor of the status of human freedom, rates Panama as one of 67 nations in the world that is "not free." They rate 42 as "free" and 48 as "partly free". In its annual survey, Freedom House rates poltical rights on a scale of 1 to 7, with 7 being least free. They rate Panama as a 7. They rate civil rights on a similar scale, and Panama receives a 6.

Documents have been widely circulated in this country, with names, dates, places, and details of alleged violations of human rights by the regime in Panama. I, personally, have received a letter from a Panamanian businessman who was forced, at gunpoint, from his automobile some months ago and sent into exile because he has dissented.

Can we afford a double standard in this most fundamental of areas? I don't think so, for to do so says to the world that we are cynics, using the issue of human rights only as a tactic to produce specific political results. Worse, it may say to those who hold out hope of reduced oppression and ultimately the restoration of freedom that Americans are, when you get right down to it, hypocrites. The recent history of our negotiations with the Panamanian dictatorship does nothing to dispel such concerns. So, I leave you with this question: Can we separate canal negotiations from human rights when those rights as we know them are severely limited in Panama?

Finally, what conclusions are to be drawn about these treaties?

Let me reiterate that: The Panama Canal is vital to our security and that of the Western Hemisphere; we provide the one sure guarantee that the commerce of the world will have continued access to this waterway; the rights of sovereignty we hold in the Canal Zone are the foundation of our ability to remain there to operate and defend the canal; the proposed treaties relinquish those rights and do not provide adequate guarantees against future threats to the canal; alternatives should be sought which recognize the aspirations of the Panamanian people, without compromising our ability to meet security requirements.

Thus, the treaties as proposed should not be ratified. Furthermore, it seems clear from legal opinions and historical precedent that the ratification process will require implementing legislation by the Congress.

Thank you again for inviting me to appear before you.

Senator ALLEN. Thank you very much, Governor Reagan. Your remarks constitute a very fine and forceful statement.

Will you permit questions by the subcommittee?

Governor REAGAN. Yes, sir.

Senator ALLEN. The members decided that we would impose a 10-minute period for asking questions and answering them. If that does not give sufficient time, then we would have a second round of 5 minutes each.

I am going to forgo for the time being my opportunity to ask questions. I am going to ask Senator Hatch if he would start.

Senator HATCH. Governor, I want personally to express my appreciation for your taking time to chat with our committee in trying to elucidate some of the more important aspects of the issues involved in the Panama Canal.

You have indicated that the Russians have been to Panama. Do you know when they were there?

Governor REAGAN. Yes; it was in the month of July. They were there for over a week.

Senator HATCH. Just a month or so ago?

Governor REAGAN. Yes.

Senator HATCH. They were negotiating various commercial agreements and so forth——

Governor REAGAN. And talking about locations for plants and so forth. Some, as I believe, were actually discussing buying, at way above the world price, sugar. They were talking about putting in processing plants for sugar refining.

Senator HATCH. They asked about buying 50,000 metric tons of sugar at almost double the world price or double the world price.

Do you have any idea as to why the Russians would do this?

Governor REAGAN. Oh, I have a very clear idea.

Senator HATCH. Please give us the benefit of your thoughts.

Governor REAGAN. We could go back, if we wanted to, and quote Lenin; he said that they would take Eastern Europe. They would organize the hoards of Asia. They would then move into Latin America. The United States would be surrounded, and they would not have to take it; it would fall into their outstretched hands like overripe fruit.

I do not believe there is any indication that they have ever changed in that overall strategic plan. They are moving into Latin America first by way of Cuba. That has been very evident. I think that does pose a considerable threat to us.

SEA LANE "CHOKE POINTS"

Senator HATCH. In your statement today, you say that there is no secret that the Soviet Union believes control of over some 16 vital sea lane "choke points" means dominance of the world's oceans, and that our presence at one of the busiest and most important of those choke points is a definite deterrent.

Do you have any opinion with regard to the rest of the world's choke points as to who really controls them today?

Governor REAGAN. Yes; I think, if they don't already, they are very close.

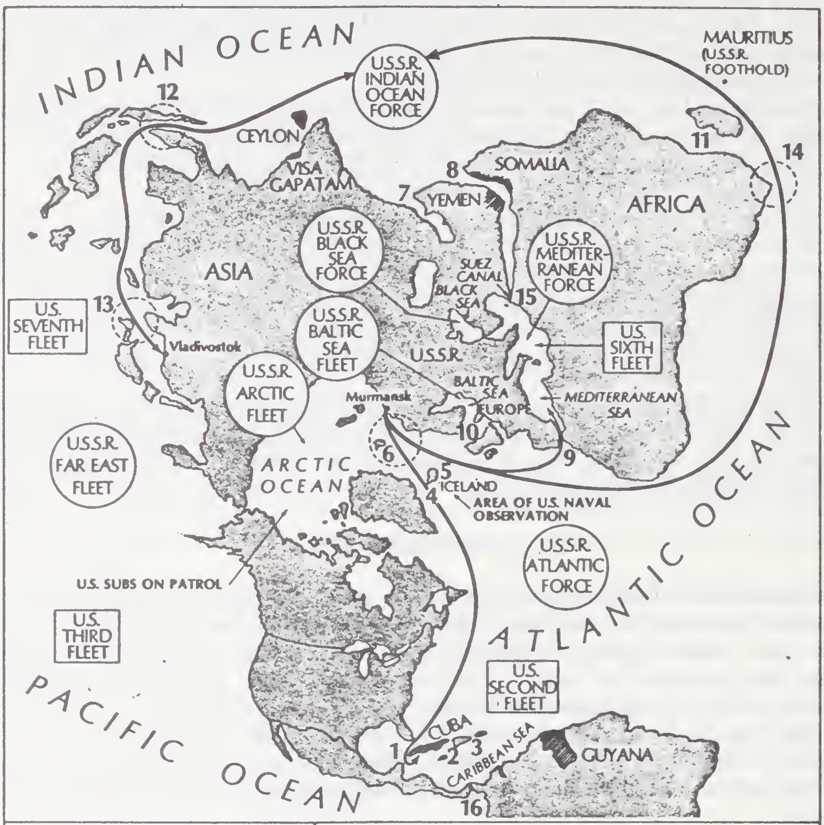
They have a simpler problem than we have. Our naval problem is one of keeping the sea lanes open. It is absolutely vital to us. The Soviet Union, in the event of hostilities, has the simple point of simply choking off those sea lanes. To do that, instead of foraging out in the open ocean, you simply have to intercept shipping in those various trade lanes.

Once upon a time in the history of the world, there were only about five such lanes. They were around the short east-west route around the world. They were the Panama Canal, the Straits of Gibraltar, the Suez Canal, the Madagascar, and the Malacca Straits. Now, of course, with the industrialization of other countries such as Japan, there are north and south lanes. There are lanes up in the North Sea and so forth.

Their maneuvers, the largest naval maneuvers ever held by any nation, some time ago revealed that their strategy was based on the interception at those points.

[Map of aforementioned choke points follows:]

WORLD MARITIME CHOKE POINTS AND U.S. AND SOVIET FLEETS


INDIAN OCEAN
U.S.S.R. INDIAN OCEAN FORCE
MAURITIUS (U.S.S.R. FOOTHOLD)
12
CEYLON
VISA GAPATAM
8
SOMALIA
7
YEMEN
11
14
AFRICA
ASIA
U.S.S.R. BLACK SEA FORCE
SUEZ CANAL
BLACK SEA
15
U.S.S.R. MEDITER-RANEAN FORCE
U.S. SEVENTH FLEET
13
Vladivostok
U.S.S.R. BALTIC SEA FLEET
U.S.S.R.
U.S. SIXTH FLEET
U.S.S.R. ARCTIC FLEET
Murmansk
BALTIC SEA
EUROPE
MEDITERRANEAN SEA
10
6
9
U.S.S.R. FAR EAST FLEET
ARCTIC OCEAN
5
ICELAND
4
AREA OF U.S. NAVAL OBSERVATION
U.S.S.R. ATLANTIC FORCE
U.S. SUBS ON PATROL
U.S. THIRD FLEET
ATLANTIC OCEAN
U.S. SECOND FLEET
PACIFIC OCEAN
CUBA
1
2
3
CARIBBEAN SEA
GUYANA
16

THE NAVAL BALANCE

UNITS	U.S.A.	U.S.S.R.
MAJOR COMBAT SHIPS	177	200
SUBMARINES	117	335
CARRIERS	13	2

▨ SOVIET FOOTHOLDS

CHOKE POINTS

1. STRAITS OF FLORIDA
2. WINDWARD PASSAGE
3. MONA PASSAGE
4. ICELAND STRAIT
5. ICELAND STRAIT
6. BARENTS STRAIT
7. PERSIAN GULF
8. RED SEA
9. STRAIT OF GIBRALTAR
10. DANISH STRAITS
11. MOZAMBIQUE CHANNEL
12. STRAIT OF MALACCA
13. TSUSHIMA (Korea) STRAIT
14. CAPE OF GOOD HOPE
15. SUEZ CANAL
16. PANAMA CANAL

Source: Author, from article published in the U.S. Naval Institute *Proceedings*, January 1977.

Senator Hatch. One of the best arguments—at least those who are proponents of the canal—offered is that the treaty has a guarantee of neutrality.

Don't you find that a very good point?

Governor Reagan. No; I——

Senator Hatch. Or do you find some matters of hazard with regard to that?

Governor Reagan. Under that neutrality clause, guarantees to all nations in peace and war are given to use the canal. In other words, we have the spectacle of possible hostilities in which nations at war with the United States would be guaranteed use of the Panama Canal.

Senator Hatch. Are you aware, Governor, that there was a guarantee of neutrality with regard to Suez before it was shut down?

Governor Reagan. Yes. And I am aware that it was a phaseout plan that was to meet some of Nassar's demands on his theories of nationalism. The British and the French had a phaseout plan of withdrawing. Two years after the treaty was signed, Nassar walked in and took over the canal and did end neutrality with regard to Israel.

It is what I was referring to here. What would we do if we were out and faced with the prospect of coming back? Britain and France took a look and said, "Well, we were going to give it away anyway; why bother?"

Senator Hatch. Some persons have indicated that this issue is a Republican issue and that the filibuster, if it occurs in the Senate, would be a Republican filibuster. Do you have any comments on that?

Governor Reagan. I have never seen an issue more bipartisan.

I just received a newspaper clipping from a paper in St. Louis, Mo., that has been running a poll on its front page with a coupon to be clipped out and sent back to the paper. In the first few days of the running of that poll, it came back 5,460—I believe—votes against ratification and 71 for. I do not think that in St. Louis, Mo., that the Republicans outnumber the Democrats by 5,000 to 70.

Senator Hatch. Do you have any comments about the recent Gallup poll showing that the percentage margin may be somewhat more narrow?

Governor Reagan. I do. I have not seen the exact wording, but I heard from someone experienced in polling that the question asked, as sometimes they are in polls, including in effect, editorial comment. It was not a plain question of do we or don't we give up the canal. That editorial comment could have influenced that vote.

Senator Hatch. Governor, you and other witnesses have reminded this committee that there is no historical precedent for bypassing the House of Representatives in the present situation. In all previous agreements between the United States and Panama where property transfers were involved, the State Department always sought authorization and implementing legislation from both Houses of Congress. Yet, in this instance, the administration appears to be deliberately circumventing the House.

Why, in your judgment, is the administration doing this?

Governor Reagan. Well, because I think the counsel and the advice coming from the State Department has been for giving up the canal for a number of years. I think there was an opinion in certain levels in the State Department, long before negotiations even were underway that we should follow the course that now we have followed. I think that, if the strategy of not having to get congressional approval were to be successful, they believe they would have a better chance of getting ratification.

Senator HATCH. The President is, in my view, trying to pressure the American people into believing that we run great risk if the treaty is not ratified. What, if any, do you perceive to be those risks?

Governor REAGAN. I think we are talking about the possibility of disturbances, riots, sabotage, and so forth in the Canal Zone——

Senator HATCH. I have another question in that, so you can answer it all at once.

Others, including myself, are advocating that, because of the diplomatic blunders here, we are likely to run some serious risks whether the treaty is ratified or not.

Governor REAGAN. That is right.

Senator HATCH. Please cover both sides of that question.

Governor REAGAN. I think that there will be trouble. I think some of those fomenting the trouble—I referred to a resolution of one student group. They have already implied that, while they are willing to have Torrijo sign the treaty, they will continue to make trouble as long as there is an American presence.

CAN'T HAVE IT BOTH WAYS

But I think the main question that we have to face is this. The treaty advocates cannot have it both ways. They cannot tell us that it is wise for us to sign the treaty—meaning getting out of the Canal Zone, getting out of the operation of the canal eventually—because there will be trouble if we don't. But then they promise us at the same time that it is all right because in the future, after we are gone, if anyone should in any way violate the treaty or hinder our use or neutrality, we have the right to go back in.

Can you picture an administration, once out, then suddenly mobilizing and sending the military forces of the great colossus of the North down to Panama because they have done something in violation of the treaty?

As I say, which way do they want that argument?

Senator HATCH. Do you think there is any possibility if we ratify this treaty that we will be shut out from the use of the Panama Canal?

Governor REAGAN. I think the possibility is there. I do not think we have the guarantees of security that we have now.

Senator HATCH. If we are out of Panama in obedience to this treaty, what do you think the opportunities will be for us to come back in and enforce our rights?

Governor REAGAN. Well, I think they are much less; and I think there is a much greater danger there than there is for us if we stay right where we are.

Senator HATCH. Can you tell us why you think that's a great danger?

Governor REAGAN. The past record of the canal. If you look at it, we have heard all sorts of stories about sabotage.

First of all, it is difficult for me to believe that the Panamanian Government itself would tolerate the sabotage of something that amounts to 25 percent of their gross national product. It is their greatest economic asset.

Second of all, we have gone through four wars. In each one of those wars, the enemy had every reason in the world to try and block that canal. The Germans in World War I were even able to come into New York Harbor and create the great Black Tom explosion in New Jersey. In World War II, with the Pacific Fleet virtually destroyed, it must have been very tempting to our enemies to try to close that canal.

In the Korean and Vietnam conflicts, we were using it—as has been testified before this committee by Admiral Moorer—for materiel shipment of the great bulk of war supplies. In a time of stress in the Mediterranean and the Middle East, in the midst of the Vietnam war, it was the presence of the canal that allowed us to place our tonnage in our naval forces so that we could respond quickly to a crisis either in the Pacific or in the Mediterranean.

The fact that, in wartime, with enemies wanting to close it down, it never has been closed down, it does not seem to me the canal is that subject to sabotage.

Senator Hatch. One of the biggest arguments offered really comes down to basically this argument about student uprisings and other disorders. There are about 1,700,000 people with only 1,500 trained as soldiers.

How do you answer the argument that this will show, by giving this canal, the greatness of America and that we are ending the colonialism of the past?

Governor Reagan. Well, I think one of the great things that is wrong with this is the whole timing. In this particular era, I do not think that it is going to be taken as a great, magnanimous gesture.

Panama happens to have received the highest per capita aid from the United States of any nation on Earth. If, after all we have done for the world, beginning with the Marshall Plan, we have not earned the love of these other nations yet, I do not think that just giving away a canal is going to do it.

I think that in the present era, in view of what we have done, there is a very grave danger that the world will not see this as a magnanimous gesture. It will see it—and with some justification—as, once again, the United States, faced with the possibility of confrontation, backing away.

I think there could be a time when the United States—as I said here about alternatives—could negotiate from strength. But, we have not been negotiating. Ever since President Johnson's statement in 1964 in which he literally gave away everything, in his own opinion, to Panama, we have simply been conceding and trying to get by with conceding as little as we have to. But it has not been a negotiation such as a nation of this kind should make.

Senator Hatch. I have one more question. What about the argument about solidarity of the Latin American countries in favor of this treaty? This is one of the big arguments that is advanced by the proponents of the treaty. They say all Central and Latin American nations are in favor of this treaty, and therefore it would be good grace on the part of the United States to go along with their desires.

Governor Reagan. I mention that in my statement; I do not believe it is true. I think there are too many instances of Members of the United States Senate who have had personal experience in talking to leaders in Latin American countries who have expressed their great concern as to what might happen at the canal if it is in the hands of

Torrijos and if the United States withdraws its control and its operation.

I know one Latin American ambassador who was more blunt. He simply expressed it to an American questioner of my acquaintance when he said, "Why doesn't your Government just say no?"

Senator HATCH. Thank you, Mr. Chairman.

Senator ALLEN. Senator Scott?

Senator SCOTT. Thank you, Mr. Chairman.

Governor, let me add my expression of welcome to you today. I commend you for coming this distance to testify before our subcommittee. We are certainly glad that you are here with us.

You mentioned a moment ago, in response to a question from Senator Hatch, that we had gradually been agreeing to give away our rights. Of course, that is terminated by the first paragraph of article I. It says that, upon its entry into force—this treaty's effective date—this treaty terminates and supersedes the 1903 treaty, the 1936 treaty, the 1955 treaty. Then, just as a catchall—I do not know what they mean here—"all other treaties, conventions, agreements, and exchanges of notes between the United States and the Republic of Panama."

So, I do not think we are going to give it all away by this treaty. We are not going to have to worry about any gradual erosion in the treaty.

GUANTANAMO NAVAL BASE IN CUBA

Let me ask you, if you will, Governor. We have the Guantanamo Naval Base in Cuba. We are there under a treaty. By virtue of that treaty, we have complete jurisdiction and control. Yet, I am told that Cuba has not been accepting the annual payment in recent years.

Do you believe the ratification of this treaty with regard to the Panama Canal will have an effect on the future of the Guantanamo Naval Base in Cuba?

Governor REAGAN. Well, it could in this case.

Again, if what we do is seen as weakness, withdrawing in the face of trouble, it could. Guantanamo is a different situation in that we lease. My understanding is that it is a lease in perpetuity. It is true that 16 years ago Castro ordered us out. It is true also that there are land mines and guns points at each other and barbed wire between Cuba and the Guantanamo base.

Guantanamo is, however, sovereign Cuban territory. We are talking about a lease. But in 16 years not one move has been made to remove us. Evidently Castro knows that if he tried to remove us by force, with our forces there, he would be in a confrontation with the United States.

The difference is here, in this treaty, that we ourselves are going to phase out. There will come a point in which we will not have any forces. We would be faced with the awful choice of whether to try to send them back.

The only thing that I could see about Guantanamo, Castro might see this as an opportunity now by saying, "Well, I am willing to risk forceful ejection of the United States," with the belief that there would be no further trouble from us and we would withdraw.

Senator SCOTT. Governor, would you share your thoughts with us regarding the suggestion that has been made that our relationship with the Third World will be damaged if this treaty is not ratified by the Senate? Do you see any damage with our relationship with the Third World?

Governor REAGAN. Well, I don't know how it could be damaged more. I don't know of a single instance where they have voted with us in the United Nations. Their hostility seems to be pretty evident.

I do not think we should settle for that. I think this is part of a much greater problem. That is, what is the foreign policy of the United States? I think once we evolve a foreign policy that recognizes this particular situation in the context of our relationships with the Latin American nations and with the Third World, and we go at it from strength, then I think we could improve those relations.

Senator SCOTT. Governor, in your prepared remarks, you indicated you have not had an opportunity to see the treaty, although you have been briefed about it. We received copies yesterday.

Article 12 relates to a sea-level canal or a third lane of locks. It indicates that Panama and the United States may want to negotiate for a sea-level canal sometime in the future. It says that no new interoceanic canal shall be constructed in Panama during the duration of this treaty except in accordance with the provisions of the treaty.

Then it says that during the duration of the treaty that the United States shall not negotiate with third states for the right to construct an interoceanic canal on any other route in the Western Hemisphere except as the two parties may otherwise agree.

In other words, this would bind the United States not to put a canal in Nicaragua or anyplace along the isthmus at all. But I do not read where Panama cannot authorize some other nation to put a canal in. The article is not clear on that point.

Do you feel there is any justification for the United States agreeing that it will not construct a canal anywhere within Panama without consent of Panama or anywhere outside of Panama without the consent of Panama? I spoke of quid pro quo a while ago. I just do not see any there. I would like your thoughts on this.

Governor REAGAN. As I say, I myself have thought highly of the third lock plan. I have been unable to understand the importance of talking about another canal that we would build when we are now being forced to give up the one we already built.

It seems that history is repeating itself on this canal outside the Panama aspect. Panama hastened to ratify the original treaty because they were fearful of a large body of opinion in the United States that the canal in the beginning should have been in Nicaragua. So, maybe they are just trying to make sure that they continue to have the monopoly there in Panama by preventing us from building one anyplace else.

Senator SCOTT. From the viewpoint of the United States, do we gain anything by agreeing that we will not build a canal outside of Panama?

TRANSLATION OF BETHANCOURT PRESS CONFERENCE

Governor REAGAN. No, Senator, we do not.

There is another thing that I think should concern us, since treaties have to be in two languages. I have received a translation of a press conference that was held by Mr. Bethancourt in Panama recently. He was making claim to the press of their country; it is something that I think is kind of a bombshell.

He was making claim that there is no substance in the right of expeditious passage for U.S. ships in the future through the canal; that the word "expeditious" was used because the United States wanted "privileged" passage. He explained to their press that they settled for the word "expeditious" because they realized that here in this country the treaty advocates had to sell the treaty to the Senate and the Congress. Therefore they had that, but he made it very plain that "expeditious" did not mean that if an American warship, for example, asked for priority transit through the canal, it would get it. There would be no privileged transit provided for U.S. ships.

Senator SCOTT. You made some reference, Governor, in your principal remarks with regard to selling the American people. I wonder whether you want to elaborate on that in any respect. It just seems to me that, under our system of representative government, the ultimate will reside in the people of the country collectively. The sovereignty is not in the executive branch. It is not in the Chief Executive. The sovereignty is in the people.

Perhaps they could do a little educating of the President. Perhaps he will learn that before this action is taken by the Senate on this treaty. I have personal thoughts, but I would still like your thoughts.

Governor REAGAN. Senator, I think the violation of the sovereignty of the people has been evident over a period of 13 or 14 years. It was only last year in the campaign, and virtually by accident that the people of this country became aware that we had, over a period of years, been negotiating to give away the canal. Since then the secrecy factor has been gone.

You have to ask why. There must have been a feeling on the part of those who wanted to give up the canal that they must not let the people know about it too soon or the people would rise up in opposition.

Now, I believe that in some of the efforts to propagandize the result of the treaty there have been distortions of history given the American people. This is not a last vestige of colonialism, as it has been called. We did not engineer the revolution of Panama. I think the American people should know that we went down in good faith to negotiate with Colombia.

COLOMBIA WANTED $40 MILLION

Panama had wanted to free itself from Colombia for a long time. Colombia, on the other hand, was stalling because their contract with the French expired in 2 years. They knew that we were willing to pay the French $40 million for their rights in the French Canal Company. Colombia wanted the $40 million. They thought that, if they just held out for 2 years until France was out by termination of the contract, then they would get the $40 million.

They rejected the treaty. But, again, as I said, there was a large body of opinion in the Congress of the United States that the canal should be in Nicaragua. Panama saw its chance. Panama hastily, with no provision, militarily or otherwise, announced its secession from Colombia, hired a Frenchman as Minister Plenipotentiary to negotiate immediately a treaty with the United States, which he did. Panama signed that treaty. That was to stop us from going to Nicaragua. They wanted the canal because it was the only economic base upon which they could have a nation to begin with.

All of this has been distorted to the American people. I think the American people should know it. Now, again, I think the American people are being told that there will be no change, no difference in what happens to us if these treaties are signed.

I do not think the American people realize that, immediately in the loss of our rights of sovereignty in the Canal Zone, American citizens in Panama will be subject to the rule of a dictator. I have read here testimony pointing out there are really no political rights granted to the people there and very few civil rights.

There will be a takeover of some 70 percent of the property in the Canal Zone. There is no reason to believe that we have guaranteed, in perpetuity, our use of the canal. So, it is a case of, yes, educate the people. As Jefferson said, "If the people understand all the facts, the people will not make a mistake."

Senator SCOTT. Thank you, Governor.

NO POINT IN COMPLETING THIRD LANE OF LOCKS

You indicated also an opinion that it would take 10 years to construct a third set of locks in the canal. You might well look with favor on that. The treaty, however, provides that the United States shall have the right to add a third lane to the locks. But, under the conditions that we will continue to occupy the entire Canal Zone, subject to everything that is in this treaty.

Since we have to be completely out of the Canal Zone with our forces by 1999 and it takes 10 years to complete, if we started now we would only have 12 years. Under those circumstances, would you feel that the United States should expend the money to put in a third set of locks?

Governor REAGAN. No, Senator. That is why I suggested it as an alternative, to help the economy and also to make the canal more effective.

I understand that there are just 13 ships—there are others who could testify to that more accurately—but I understand there are only 13 ships in our Navy that cannot now transit the canal.

Senator SCOTT. I believe Admiral Moorer said something to that effect.

Governor REAGAN. Yes; but anyway, the whole fallacy of constructing the third-lock canal now would be in building that new canal in an area we are giving away and over which we will have no control—it is already rather unreal to me that we are talking about paying a country $80 million a year to take the canal off our hands.

Senator SCOTT. Governor, you talk about binding ourselves not to construct a canal without Panama's permission anywhere in the isthmus within or without Panama. I think you indicated that you disagree with that provision of the treaty and the third locks. I would assume that you would also not want to see us construct any new canal within Panama that would have the limitations as contained in the treaty.

Governor REAGAN. Not under the terms of this treaty.

Senator SCOTT. Thank you, Mr. Chairman.

Senator ALLEN. Thank you, Senator Scott.

Senator Jesse Helms of North Carolina, though not a member of the subcommittee, is present. Knowing of his vital interest in this important issue, I am going to ask Senator Helms if he would like to ask any questions.

Senator HELMS. Mr. Chairman, thank you very much. I will be brief. I welcome Governor Reagan.

Governor REAGAN. Thank you, Senator.

Senator HELMS. Mr. Chairman, I deeply appreciate your courtesy.

Governor Reagan, I commend you on an excellent statement with regard to this matter.

Governor, during the month of August there were press reports in my State to the effect that you had assured President Carter that you would not be particularly active in regard to this issue. Was that press report in error?

Governor REAGAN. Yes, Senator; it was.

The President called me and expressed the wish that I would be on their side in the canal talk. I told him that in principle it was obvious I was opposed to this. He told me that, of course, the negotiations had been going on for 13 years. I said that for 13 years I think they should not have been.

I did tell him that, not having seen the treaty, not being briefed as to what was in it, knowing only what I had seen in the headlines, that I certainly would hold my fire until I had had an opportunity to know exactly what was in the treaty. He thanked me and said that was very gracious of me. Subsequently, I was briefed by Ambassadors Bunker and Linowitz. Several hours later, I stated in New York that they had not changed my mind.

Senator HELMS. That perhaps falls in the same category as the repeated reports in the press and some other media that Senator Hayakawa was definitely going to vote for the treaty. I called Senator Hayakawa in California a couple of Saturday nights ago. He told me at that time that he had not seen the treaty and had not made up his mind on it.

I hope the press will note that Senator Hayakawa has not made up his mind on the treaty and that Ronald Reagan will continue informing the American people.

Let me ask you about the possibility of violence if the treaties are not approved. Dean Rusk was here not long ago. Frankly, I was appalled at his comment on television that, in effect, put him in the position of waving a bloody shirt, and, to be blunt about it, bordering on condoning violence if the Senate does not ratify these treaties. It seemed almost inflammatory. Others have made similar statements.

Let me ask you, Governor. The violence that occurred in the mid-1960's—who largely was responsible for that? Where did it originate?

Governor REAGAN. Well, it had been my understanding from studying that 1964 demonstration that went on for about 3 days and was total violence down there with machetes, rocks, guns, and everything being used and even destruction of Panamanian property by the Panamanians themselves; the kind of riots with which we are all too familiar these days. It is my understanding that those were very largely engineered and stirred up and kept going by political leaders of the left.

Senator HELMS. On the university campus in Panama; is that not correct?

Governor REAGAN. Yes.

CHIEF NEGOTIATOR BETHANCOURT

Senator HELMS. Who was the head of that university at that time?

Governor REAGAN. Now, you have me on that, Senator.

Senator HELMS. Dr. Escobar Bethancourt?

Governor REAGAN. I thought so and was going to say so, but I was afraid to take the chance.

Senator HELMS. Where is that gentleman today?

Governor REAGAN. He is the No. 1 aide of General Torrijos.

Senator HELMS. That is correct, and the chief negotiator of this treaty, as well.

Governor REAGAN. That is right.

Senator HELMS. Is it not a fact that this gentleman is widely recognized—now, I am not making this accusation, but it has been made by many responsible observers and he does not deny it; that he is a dedicated Marxist.

Governor REAGAN. Well, this is also true. The Minister of Education of Panama, the Secretary of the Treasury, and, I believe, the Minister of Labor—but don't quote me on that because I might be wrong on that one—they are each memers of what is called the People's Party. The People's Party is basically the Communist Party of Panama, and it is the only political party which is still allowed to operate in Panama.

Senator HELMS. So, it is not jingoism, it is not seeing a Communist under every bed to suggest that—as many of us have—it is obvious that the Soviet Union has a direct and active interest in this treaty?

Governor REAGAN. Oh, I think they have a very direct interest in the treaty.

PRESIDENT COMMITTED TO PRIOR AUTHORIZATION BY CONGRESS

Senator HELMS. Let me mention one aspect of your concerns, as contained in your opening remarks—the matter of this treaty being the duty of Congress and not just the Senate alone. Both the House of Representatives and the Senate must act on this matter.

On June 30 I visited with President Carter for about 40 minutes. I offered him an alternative to this unwise treaty. It was very similar to the alternative that you have presented today—the modernization of the locks and so forth. We discussed it in some detail. I presented it on behalf of three other Senators and myself: Senator McClellan, Senator Harry Byrd of Virginia, and Senator Thurmond.

There was a cover letter signed by the four of us stating our opposition to the treaty and enclosing a letter signed by four former Chiefs of Naval Operations who warned of the catastrophic potential of this treaty.

Subsequent to that, Governor, I had two telephone conversations with the President. He called me twice in North Carolina in August.

I had previously inquired of the White House relative to the question of whether there would be any attempt by the President to circumvent the Congress in this matter.

He gave me his word that there would not be. He said, "Jesse, I agree that it is the duty of the House and the Senate." Subsequently—I believe it was the next day—I wrote to the President. I cited our understanding as I perceived it to be. I commended him as a gentleman for taking that position because it is the constitutional position, as you know.

Inasmuch as the President has not written me or otherwise contacted me saying that my understanding, as stated in my letter to him, was in error. So, I accept his assurance in good faith. I do not believe that he would renege on that assurance. I would be very disappointed if he did. Again, I commend you, Governor, on your fine testimony.

Mr. Chairman, I ask that a copy of my letter to the President be included in the record at this point.

Thank you very much, Mr. Chairman.

Senator ALLEN. Thank you, Senator Helms.

[The letter follows:]

United States Senate
WASHINGTON, D.C. 20510

August 12, 1977

President Jimmy Carter
The White House
Washington, D. C. 20500

Dear Mr. President:

I would once again express my gratitude for your thoughtful telephone calls yesterday concerning the proposed Panama Canal Treaty.

As I mentioned during our conversations, there were efforts during previous Administrations to circumvent the very clear Constitutional responsibility of Congress in connection with the Panama Canal. Insofar as I know, these proposals, emanating from the State Department, were not approved by the President; indeed, the President may not even have been aware of what was going on. In any case, there was serious concern last week among several Senators that such efforts may again be made -- without your knowledge. That was why I presumed to telephone you.

Needless to say, I was gratified by your assurances to the effect that there is no intention on your part, or on the part of your representatives, to circumvent Congress via interim efforts to transfer U. S. property, or surrender in any way U. S. control or authority over the Canal.

Moreover, I was immensely comforted by your comment that both houses of Congress, not just the Senate, must approve any transfer of U. S. property or territory, and that none of this will occur unless and until such Congressional approval is given, and both countries have signed a new treaty.

Let me say again, Mr. President, that you have gone out of your way to be a gentleman. I admire and respect you for your forthrightness, even though we do not agree on this particular issue.

Thank you, sir, for your consideration.

Respectfully,

Jesse

JESSE HELMS:s

Senator Allen. Governor Reagan, I am concerned that there is much more involved in this issue than giving the Panama Canal away and paying the Panamanians to take it.

I feel that this is symptomatic of a trend in this country to give away our very substance to foreign countries, to back down when confronted around the globe. I would like to ask if you feel that, if we make these concessions—when it is not necessary that we do so—that our concessions would encourage other nations to confront us at various points throughout the world and that these concessions would make it harder for us to resist such confrontations in the future.

Governor Reagan. Senator, I could not agree more.

We are in a climate where we abandoned an ally in Vietnam after we had forced that ally literally to accept the terms of the Paris accords, which were then broken by the enemy. We are withdrawing our troops from Korea. It looks as if we are trying to find a way out of our alliances with the long-time ally, the Republic of China on Taiwan. There is the situation in Puerto Rico. There is Guantanamo, as Senator Scott mentioned.

All of these things are there. It just seems to me that there is no way that this will be seen as a magnanimous gesture; it will be seen as further retreat into isolationism by the United States.

Senator Allen. I think it is interesting that full control of the canal being given to Panama purports to be postponed for 23 years. I assume that it was not felt that an immediate giving away of the canal would have had no chance at all of passing.

Do you feel that merely delaying the full operation of the gift of the canal for 23 years changes the principle? Is it not just as wrong to give the canal away fully 23 years from now as it is to give it away immediately?

Governor **Reagan**. I agree completely. I also add that there is the threat that, once you have announced your willingness to give it away, it is the same as in the Suez incident, the person you are giving it to can say, "Well, how much trouble will they make if I just accelerate the taking of it?"

They have a psychological point there, once you have said that you are going to give it up anyway.

No, I do not think the time lapse makes any difference at all.

Senator **Allen**. Another thing that concerns me and many others I am sure is our agreement to maintain the neutrality of the canal. Would that permit and require us to see that, in the event of war with Russia, we would have to afford access to the canal to vessels of the Soviet Union?

Governor **Reagan**. That is the Panamanian interpretation of that.

I might add again that, when I was briefed by the ambassadors, they told me and I asked specifically who would declare, who would determine what was a violation of neutrality. Would that be something we could do?

I was assured that all of this was taken care of. But, now, in the translation again of that press conference in Panama, that question was also asked of Bethancourt. The reply was that there was no assurance or no provision in the treaty whatsoever that would allow the United States unilaterally to decide that the neutrality had been violated.

So, again, we come down to which version of the treaty are we going to look at.

Senator **Allen**. I was also impressed in your pointing out that, while the full delivery of the canal to the Panamanians is postponed for 23 years, the fact that we are giving in at this time would encourage them to present the same arguments, the same threats of force, the same demonstrations to accelerate this process of withdrawal.

Do you feel that this principal is something in the nature of the camel putting its nose inside the tent and then gradually moving on in to take possession of the full tent?

NO PRACTICAL CONTROL OVER 23-YEAR TERM

Governor **Reagan**. Yes; because, if we are going to listen to the arguments about 23 years, we had better get back and look at how fast the phaseout takes place. What takes place in the first 30 months? The assumption by them of control over the Panal Canal Zone.

For example, the Ministry of Housing of Panama will take over the American houses in which American employees are now living. They will take over the schools.

All of this is in there early. So, it is not a case—as I think many people tend to believe—that for 23 years business goes on as usual except that we are going to be teaching them how to run the canal.

Business does not go on as usual. It starts immediately with changes being made, including the provision that, even when we have a joint command in those latter 23 years, only one American flag will be allowed to fly in the Panama Canal Zone. But that will not be the primary flag; that will be in a secondary position. Their flag will fly first.

There are a great many details in here, none of which seem to favor us, including the implicit understanding that at a certain point our forces cannot exceed theirs. Well, they have close to 9,000 men, supposedly, in their national guard. But over 7,000 of those are policemen. All they have to do is designate them as policemen, and we are down to 1,500 men.

Senator ALLEN. I notice too that the safety, rights, and protection of our American soldiers who are there would be damaged a great deal. Their position would deteriorate because crimes committed by or against our service people would be tried under Panamanian law without the protections that are afforded under our Constitution. All our courts would have jurisdiction over would be offenses between servicemen. So, it would deny this protection to our soldiers there; would it not?

Governor REAGAN. That is right.

Senator ALLEN. Thank you very much.

If there are other questions, let us go the 5-minute route now.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

I realize that Governor Reagan has another appointment; I do not think he has that much more time. I do have some more questions, but I think I will withdraw those.

Your statement has been excellent. I think it has erased a lot of the misrepresentations that I know have been made by the proponents of the treaty. I think your analysis has been excellent.

I was in Panama recently and met with the President of Panama and the Minister of Planning and Economic Affairs. They asked me what I thought the chances are for ratification in the Senate. I said that I hope they are not making this an all-or-nothing proposition because I do not believe that it will be ratified in the Senate, certainly when the President ignores the constitutional issues that have been raised.

I took the same position independently that you have taken here today. I would agree that we need to examine the possibility of upgrading the treaty. We need to do everything that we possibly can to create a good relationship not only with Panama but with all of our Latin American neighbors.

One of the major points that you make in your testimony today—and I think one of the most valid points—is that we do not have a cohesive program of foreign policy with regard to our Latin American nations. I would commend you for bringing that forth, Governor.

I want to thank you for your comments here today. I think they have been informative and well reasoned.

Governor REAGAN. Thank you.

Senator SCOTT. Mr. Chairman, I have no further questions for the Governor. Once again, I personally am glad that you were with us. We have other witnesses and we could ramble on for a long time, but it is not necessary.

Senator ALLEN. Thank you very much, Governor Reagan and Senator Hayakawa. We thought that no debate on this question would be complete without having you express your views. We appreciate you both coming before the committee. We feel that your statement, Governor Reagan, has been very fine indeed. We hope that we will see the hoped-for, much-desired result of your wise testimony on the opinions and judgments of the distinguished junior Senator from California, our good friend, Senator Hayakawa.

Governor REAGAN. Mr. Chairman and Senators, thank you very much.

Senator ALLEN. Our next witness will be Congressman Flood. I understand that there is a vote in the House and that you will have to leave shortly.

Mr. FLOOD. Yes; there is a B-1 bomber vote over there.

Senator ALLEN. You may handle your statement as you wish.

I wonder if Congressman Crane would also come up. It may be that we could hear from both of you before lunch and question you jointly.

We are delighted that you both have come before the committee to give us your views. Both of you are recognized authorities on this issue. We certainly appreciate your presence here before the committee.

I might state to you both that the committee certainly supports your position that this matter needs to be decided by both Houses of Congress in addition to the ratification vote in the Senate.

Please proceed, Mr. Flood.

TESTIMONY OF HON. DANIEL J. FLOOD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. FLOOD. Mr. Chairman, I appreciate the opportunity to be here.

I doubt very much that I can add anything material to what you and the committee have heard. Under the circumstances, I do feel that I should be here.

Mr. Chairman, on July 29, as you will recall, I submitted to this subcommittee a statement summarizing my views on the problem of the Panama Canal and outlined a program of action for the United States. There is little of consequence that could be added to the points presented in that testimony. For the benefit of those who have not seen my July 29, 1977, statement, I have placed additional copies on the table.

The announcement on August 11, 1977, of an "agreement in principle" for new Panama Canal Treaties was no surprise to those who have closely followed the canal question, and these include many Members of the Congress. That news was a high point in a plan long in preparation to present the Nation and the Congress with a fait accompli. As such, it represents a real challenge to the Congress in the exercise of its constitutional powers as regards the disposal of territory and other property of the United States in the U.S. Canal Zone, which the Congress has not authorized. For this and other reasons, the Congress must face the challenge head on.

Since August 11, the major news media of the Nation have featured the Panama Canal question with an enormous coverage, a large part of which has been in support of the projected surrender of U.S. sovereignty over the Canal Zone and, ultimately, the giving away of the Panama Canal itself, all without compensation.

Over a period of years, distinguished Members of the Congress in many addresses in the Congressional Record and distinguished witnesses in hearings before cognizant committees have provided an extensive and authoritative documentation on all significant aspects of the canal question; and these have been widely distributed. Prepared by such information to detect and evaluate deceptive propaganda, diplomatic sophistries and other skulduggery, the people of the United States and the Congress are not likely to be stampeded into approving any treaty that surrenders U.S. sovereign control over the Canal Zone or gives away the Panama Canal to any other country or international organization.

One of the most flagrant examples of fallacious prosurrender propaganda so often stressed is that, if we do not surrender the Canal Zone to Panama, the relations of the United States with all of Latin American will be seriously impaired. There could be no greater deception, for major Latin American countries, especially those on the west coast, know Panama well.

Their leaders from Presidents down know what the consequences of such surrender would be for their own economy in the way of increased transit tolls. Attention is invited to the perceptive 1976 article by Dr. Mario Lazo on "Panama Canal Giveaway: A Latin American's View," which I request be included with my remarks.

As stated many times in my addresses in and out of Congress, the most crucial issues involved are not local questions between the United States and Panama, most of which should be handled administratively by responsible officials of the Canal Zone. In contrast, the crucial questions are matters of global significance affecting the security not only of the United States but as well that of the Western Hemisphere and, indeed, of the entire Free World.

In this light, the Panama Canal problem transcends all partisan considerations; and must be considered on the highest plane of national interest if our course is to be sound and our future well-being protected.

As to this angle, Soviet power, understanding the vacuum that would be created by the projected relinquishment by the United States of its sovereignty over the Canal Zone, has already moved toward establishing a beachhead in Panama by means of a July 19, 1977, U.S.S.R.-Panama economic pact. This matter was discussed at length in the American Legion National Security-Foreign Relations Bulletin, July–August 1977, major excerpts of which I ask be included in my remarks.

Mr. Chairman, the pact, I believe, is most significant for it includes provision for the Soviet Union to utilize the Panama free zone in Colon, which in turn now includes Old France Field in the Canal Zone, a World War II airfield located within the zone territory and is thus within our defense perimeter.[1]

PREDICTION FULFILLED

When first learning on March 13, 1975, about the lease of Old France Field to Panama, which was not authorized by the Congress, I promptly protested it to the Secretary of the Army as "part and parcel" of the State Department's program for "piecemeal erosion" of the Canal Zone that would invite greater demands. I have had the sterile satisfaction of seeing that prediction and many others fulfilled.

Surrender of the U.S. Canal Zone would undoubtedly have serious faraway consequences, which would include the loss of U.S. naval bases at Guantanamo in Cuba and in Puerto Rico. These two bases, with the Panama Canal, form the defense triangle for protecting the strategic Caribbean, which Admiral Mahan and other eminent strategists long ago described as the Mediterranean of the Americas. Upon the outcome of the projected giveaway will depend whether the advantageously located Caribbean Sea and Gulf of Mexico shall be transformed from peaceful avenues for ocean commerce into red lakes, thereby bisecting the Americas with enormous potentials for evil for the United States, Latin America, and the entire Free World.

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[1] Congressional Record, August 4, 1977, p. H8704.

Senator ALLEN. Excuse me, Mr. Flood. We have a vote in progress now. As soon as five lights come on, we will have to go.

I would like to address this inquiry to both of you. Would you like for us to come back immediately and conclude yours and Mr. Crane's testimony? Or would you prefer to have a recess to lunch?

Mr. FLOOD. Mr. Chairman, I can finish mine in 1½ minutes.

Senator ALLEN. Please proceed.

Mr. FLOOD. In the past, the responsible leaders of the United States always safeguarded and defended the territories over which it had sovereign control. They and the Congress never surrendered U.S. sovereign territory under threats of foreign military or mob assaults, however large the country, but stood up for American rights under international law.

Yet, since World War II, through a succession of administrations, certain leaders have sought to surrender our sovereign control over the U.S. owned Canal Zone and, eventually, the Panama Canal itself to the Republic of Panama.

A small, weak and industrially primitive tropical country, it simply does not possess the resources, the manpower, or technical skills required for the efficient maintenance, operation, sanitation, and protection of the most vital waterway of the Americas. The satisfactory performance of these crucial functions requires the combined technological, industrial, military, and naval might of the United States, or that of some other great power—if you know what I mean.

Mr. Chairman, though my statement on July 29 and its attachments cover the more important aspects of the canal situation and need no elaboration, as a member of the Subcommittee on Defense of the House Committee on Appropriations, I wish to stress a major point.

The historic Isthmian canal policy of the United States has always been to safeguard our economic and broad national interest investments involved in the construction, maintenance, operation, sanitation, and protection of the Panama Canal enterprise by insisting upon sovereign control in perpetuity over the area in which it is located. I feel sure that many Members of the Congress still share this view and will demand adherence to that policy.

There is a vast difference between managing a canal with sovereign control over the territory in which it is located and one in an area over which the United States has only "treaty rights" and is beholden to a weak Central American country.

As to the reactions of Latin Americans to the projected U.S. surrender at Panama, which have been so falsely used by its advocates, I have seen no better statement than that of the late Dr. Mario Lazo, the distinguished Cuban lawyer and author who, in his 1976 paper wrote:

> The almost universal reaction among the educated people of Latin America who are not politicians to a promulgated Kissinger-Bunker giveaway treaty would be, at first, incredulity, then sadness and eventually ridicule and even contempt for the once greatly respected nation that had shown itself no longer to have the will to maintain its prestige and discharge its responsibilities.

The Panama Canal now contributes the grave issue that can serve as a catalyst to restore the courage and willpower of the American people.

Thank you very much, Mr. Chairman.

Senator ALLEN. Thank you very much, Mr. Flood.

The material to which you referred will be made a part of the record, without objection.

[Material follows:]

Special Study No. 1
Council for Inter-American Security

1977

PANAMA CANAL GIVEAWAY: A LATIN AMERICAN'S VIEW
BY MARIO LAZO

Panama Canal Giveaway: A Latin American's View was written shortly before Mario Lazo's death in 1976. Mario Lazo went to Cuba after receiving his law degree from Cornell and serving as a Captain in the U.S. Army in World War I. He took a law degree from the University of Havana and later founded and headed on of Latin America's most prestigious law firms. Through the years his firm represented the U.S. Government, major corporations, and a distinguished Cuban clientele.

After the fall of Batista, Dr. Lazo valiantly continued his law practice in Havana. Imprisoned and threatened with execution by the Castro regime, his wife, Carmen, saved his life and helped him escape to the United States. For the next seven years Dr. Lazo set himself the task of writing Dagger in the Heart *which even* The New Republic *has called "the best account to date of Castro's victory," bringing to the undertaking the investigative skills of a great lawyer, and a reputation that permitted him to reach into the highest official circles in Washington.*

The fate of the Panama Canal deserves a prominent place among the issues facing the Congress of the United States and the New Administration. The American people should be informed and alerted on the subject. What are the basic facts?

By the treaty of 1903 the United States bought from Panama for cash plus an annuity, a strip 50 miles long and 10 miles wide through a pestilential tropical zone wracked by fevers but containing the most feasible pass between the Atlantic and Pacific oceans. The treaty granted the United States perpetual sovereignty over the Canal Zone "to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

The Americans who went to work in this inhospitable environment wrought a miracle in 11 years. They created a disease-free inter-ocean waterway which remains to this day one of the wonders of the world. For more than 60 years the United States has operated the Canal for the benefit of the commerce of all nations, lifting in recent years more than 15,000 ships annually across the continental divide, moving them quickly, safely and economically from one ocean to the other.

This achievement forms one of the most inspiring records in history—and those who have profited most from it are the people of Panama. Had it not been for the United States they would still be crossing the Isthmus on muleback, as they did for centuries under Spain and Colombia, for only the United States could have undertaken the great and costly venture.

In fact, for over 60 years Panama has lived off the Canal. The annuity paid by the United States to Panama is by now many times the amount originally agreed upon. More than two-thirds of the approximately 24,000 workers in the Canal Zone are citizens of Panama. The public vessels of Panama are put through the locks free of charge, but the ships of the United States and of other nations pay a standard toll that has only been raised once in 62 years. Various properties in Panama, worth many millions, have been deeded back to Panama by the United States without charge. A trans-Isthmian automobile highway on Panamanian territory, paralleling the Canal Zone, was constructed by the United States for Panama without cost, but Panama has failed to keep it in good condition. A great bridge, also built at no cost to Panama, connects Panama City with the western half of the country.

The United States has thus been more than fair and generous to Panama. Yet every modification of the 1903 treaty has provoked progressively more extravagant demands. Panamanian politicians portray Americans within the Canal Zone as monsters, and Communists and other leftists throughout the Hemisphere make common cause with them against the United States. The lesson of history that appeasement rarely appeases has not been learned by the State Department as it continues a misguided effort to turn off the spigots of hatred and defamation in Panama against the nation that has converted a deadly swamp-land into a great garden surrounding the magnificent waterway.

Since Nasser got away with seizing the Suez Canal in 1956, Panamanian politicos have dreamed of little else than taking over the Panama Canal. They have continually vilified the United States and incited their population against it. Some American liberals have applauded these tactics, arguing that in a "new world order" unilateral control of the Canal is obsolete.

The unhappy Suez experience under Egyptian control, however, hardly recommends Panamanian domination of an interoceanic waterway indispensable to world commerce and to the security of the United States and its allies. During a conventional war 90% of bulk tonnage to support committed forces moves by ship. The demonstrated value of the Canal in World Wars I and II was fully confirmed by its use during the Korean War, the Cuban Missile Crisis and the Vietnam War. Between 1964 and 1968 the military-sponsored cargo through the Canal increased by 640% for dry cargo and by 430% for petroleum products. In time of peace 70% of Canal cargoes originate in or are destined for the United States.

The rights of the United States to the Panama Canal were bought and paid for and the nation is under no obligation to renounce or modify those rights. American taxpayers contributed more than 350 million gold dollars to build the Canal, a sum worth many times that amount in the depreciated currency of 1976. This includes the cost of digging through Culebra Cut and erecting the locks and dams and hospitals and machine shops needed for the gigantic enterprise. As of today the United States has invested nearly seven billion dollars in the purchase of land from private owners and in the construction, administration and defense of the Canal.

The treaty on which U. S. ownership rests is as clearly final as the purchase of Louisiana from France in 1803 or of Alaska from Russia in 1867. Amazingly, however, the U. S. Administration is engaged in an all-out effort to obtain Congressional approval for surrendering the Canal to Panama. No similar surrender has been attempted since the nation was founded in 1776.

Does this sound incredible? Here are the facts.

On February 7, 1974, in Panama City, the Panamanian Foreign Minister, Juan A. Tack, and Secretary of State Henry A. Kissinger, acting in behalf of the United States, initialed a document in which the United States agreed to negotiate a new treaty containing the following "principles": 1) The original 1903 treaty, by which the United States acquired perpetual sovereignty over the Canal Zone, would be abrogated, 2) The "concept of perpetuity" of the U. S. ownership would be eliminated, and 3) U. S. jurisdiction over the Canal would be terminated at a date to be fixed in the new treaty. It was also agreed that from the moment the new treaty became effective, the operation and defense of the Canal would be a joint undertaking by the two countries, so that the United States would be unable to act without the consent of Panama. Every concession contained in the 1974 agreement was made unilaterally by the Executive of the United States, all without the authorization of the Congress.

Since a treaty cannot bind the United States without the approval of two-thirds of the Senate membership, the Secretary of State and his chief negotiator, Ambassador Ellsworth Bunker, had consulted Congressional leaders before leaving for Panama. They were advised that surrender of U. S. sovereignty was not a negotiable item. Consequently, when it became clear that they had chosen to ignore this advice, there was an immediate reaction in the Senate. On April 5, 1975 a sense-of-the-Senate resolution calling for continued and undiluted U. S. sovereignty was introduced. It now carries the signatures of 37 Senators, over one-third of the membership, most of them collected in a single afternoon.

But the White House did not accept defeat. During the summer months of 1975 it stepped up its well-organized campaign to break down Congressional opposition. The President knew that if Pentagon support could be obtained, it would be much more difficult for the treaty opponents on Capitol Hill to emphasize the military security aspect of the controversy.

Defense Secretary James R. Schlesinger, subsequently fired by the President, and the vast majority of high-ranking military officers, sharply opposed the giveaway treaty. The United States was being driven out of Southeast Asia at the time and they were in no mood for another surrender. But the White House and the State Department held some high trump cards. For one thing, the President, as Commander-in-Chief of the Armed Forces, could promote and demote officers. Also, the State Department had a few allies at the Pentagon on this issue, notably the [then] Deputy Secretary of Defense, William P. Clements, Jr.

In July 1975 Dr. Kissinger convened a meeting of the National Security Council to press the issue, but it took a second meeting on August 9, and a directive from President Ford the same day to all the agencies involved, to break the Pentagon deadlock. "We were asked to go back and be as forthcoming as we could be," a Defense official explained. On September 16, 1975 the *New York Times* headlined the news: PENTAGON YIELDED TO FORD ON CANAL—DIRECTIVE BROKE DEADLOCK. The *Times* had been the leader of the liberal press in supporting the surrender. In a leading editorial at the time, titled *Breakthrough in Panama*, it said, "A formidable roadblock to a new Panama Canal treaty has been removed."

General George S. Brown, Chairman of the Joint Chiefs, flew to Panama with Ambassador Bunker and announced the Pentagon commitment after a talk with General Omar Torrijos, Panama's dictator.

Two months earlier, in June 1975, the House of Representatives, by the decisive vote of 246 to 164 had denied funds for conducting the "surrender". The *Times* called this action "a disgraceful exhibition of chauvinism and irresponsibility" and referred sarcastically to opponents of the giveaway treaty as "amateur strategists on Capitol Hill". Under State Department pressure the denial of funds barrier was subsequently rescinded.

In its elation over these successes, however, the State Department blundered. Believing that in the long, emotional and at times bitter controversy the big-business world might be the key element in selling the new treaty to Congress, it tried to enlist its support by having representatives of American corporations and banks doing business in Latin America invited to a meeting at the State Department.

The purpose was to have them organize a "steering committee" to raise a half-million dollar fund for use over a two-year period in lobbying members of Congress, mounting a national campaign through advertising, public speakers and business-academia seminars and for setting up an information clearing center. Those invited were to be reminded of the anti-American riots in Panama in January 1964 and warned that unless the proposed treaty became effective, renewed and increased violence was virtually certain to occur. Also, unless they got behind the proposed treaty their investments in Latin America would be in danger!

The meeting at the State Department took place on October, 30, 1975. Some who attended were shocked when a State Department official raised a trembling finger and asked, "What would you do if 100,000 Panamanians, including women and children, marched on the Canal Zone?" One participant said later he had asked himself if the United States had run out of high pressure hoses. Some were lawyers and every lawyer knows, as every diplomat should know, that an agreement cannot be negotiated under duress. The exploitation of fear by high officials of the world's wealthiest and most powerful nation—a form of blackmail—astonished and infuriated many of those present.

Although the State Department's publicity claimed otherwise, the meeting proved to be a total failure. No fund materialized and some of those who had impulsively volunteered to serve on the steering committee later withdrew.

What motivates those who would surrender a possession which is the strategic center of the Americas and is indispensable for Hemispheric defense?

The spokesman for the State Department and also its chief negotiator is Ambassador Ellsworth Bunker. In speeches across the country he gives this explanation:

1) The United States did not acquire sovereignty over the Canal Zone in 1903 but only "rights" and "it is time to stop debating this legal point."

2) The Panamanians argue that the Canal Zone, "curbs the natural growth of Panama's urban areas" and "impedes Panama's development."
3) The Panamanians will be able to keep the Canal operating effectively and efficiently.
4) World opinion expects the United States to work out a new arrangement with Panama and "our Latin American neighbors see in our handling of the Panama negotiations a test of our political intentions in the hemisphere."

Ambassador Bunker never speaks critically of the government of Panama with which he is negotiating and never mentions Communism. Let us examine the reasons which have been advanced to justify the surrender.

1) *United States Sovereignty.*

This is the pertinent language of the 1903 treaty:

"Article II: The Republic of Panama grants to the United States in perpetuity the use, occupation and control of (here the Canal Zone is described)........."

"Article III: The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II.... which the United States would possess and exercise if it were the sovereign ... to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

Aside from the certainty that the United States would never have undertaken to build the Canal unless it had unquestionable ownership and sovereignty over its protective zone, Ambassador Bunker must surely know that two U. S. Supreme Court decisions confirm the nation's ownership of and sovereignty over the Canal Zone. The first of these, given in 1907 (Wilson v. Shaw, 204 US 24) states:

> It is hypercritical to contend that the title of the United States (to the Canal Zone) is imperfect and that the territory described does not belong to this nation because of the omission of some of the technical terms used in ordinary conveyances of real estate ... It is too late in the history of the United States to question the right of acquiring territory by treaty."

The second decision in 1974, 65 years later (United States v. Husband R. Roach 406 U. S. 935) is, if anything, even more explicit. It held that "The Canal Zone is an unincorporated territory of the United States."

Moreover, there have been a great many administrative rulings, opinions and memoranda to the effect that the language employed in the 1903 treaty is neither obscure nor ambiguous and that plain and sensible words should be taken to mean what they say. Secretary of State Charles E. Hughes summed them up in 1923 when he declared that the United States would never recede from "its full right to deal with the Canal Zone . . . as if it were sovereign . . . and to the entire exclusion of any sovereign rights or authority on the part of Panama." He added that "it was an absolute futility for the Panamanian Government to expect any American Administration . . . . any President or any Secretary of State ever to surrender any part of these rights which the United States had acquired under the treaty of 1903."

Until the advent of Dr. Kissinger and Ambassador Bunker, therefore, the uniform position of the United States Government has been that its sovereignty over the Canal Zone is not an open or doubtful question. For State Department spokesmen to argue otherwise defies understanding. Their specious reasoning may be pleasing to some State Department colleagues but it is deceptive and fallacious. It illustrates the extremes to which they have gone in presenting their case.

2) *Contention that the 1903 treaty curbs Panama's urban growth and impedes her development.*

On the first count, the opposite is the case. The United States has spanned the Canal Zone with bridges and highways which are open and available unrestrictedly to Panamanians, making the two parts of the nation divided by the Zone closer to each other than to their own interior territories.

Secondly, the Canal has been the economic base that has raised the living standards of the Panamanians to a higher level than that of any country in Central America. It provides, directly and indirectly, one-fourth of the Panamanian gross national product (GNP), more than one-third of Panama's foreign exchange and about one-fifth of total national employment. According to the Panama Canal Company—Canal Zone Government, gross payments to Panama from the Canal Zone in 1975 amounted to $253,130,000, an increase of some 5 percent over the previous year. And according to the State Department Bulletin of April 23, 1973, U. S. foreign assistance loans and grants to Panama represent the highest per capita level of American aid anywhere in the world!

3) *Panama's capability to operate the Canal.*

Ambassador Bunker argues that the proposed treaty will not lead to closure of the Canal because "Panama's interest in keeping the Canal open is far greater than ours." This is so, he says, "because Panama derives more income from the Canal than from any single revenue producing source." Its "increasingly diversified economy," he adds, affords a guaranty that in Panamanian hands the Canal would be operated "effectively and efficiently". In fact, he goes so far as to say that the Canal's closure is more apt to be brought about if it continues under U. S. control and management!

Ironically, the answer to these absurdities comes from the *New York Times* itself, the champion advocate of the giveaway treaty among the news media. An article published on October 8, 1975, which must have slipped in when someone was looking the other way, reports the "man-in-the-street" attitude in Panama on this subject. "Despite the impatient and fiery rhetoric of its military government," it attests, "there is a mood of apathy and cynicism in the Panamanian population ... Many Panamanians have difficulty sustaining anger or impatience over the American presence ... they worry more about their daily lives."

The *Times* reportedly recounts a conversation with a lottery vendor in the slum district of Chorillo "where rows of rotting wooden tenements look across John F. Kennedy Avenue to the green slopes of the ... Canal Zone. 'The Canal is just a pretext to divert our attention from the real problems,' the lottery vendor says. 'What's going to happen if we get the Canal? The government will keep the money and in no time the Zone will be as filthy as Panama City.'"

Dictator Torrijos, according to that *Times* dispatch, has his political opponents, one of whom is quoted as saying, "The Government desperately needs the money from a new treaty in order to stay alive. They believe that a system of joint defense will merely insure indefinitely the military rule which Panama has now."

Alberto Quiros de la Guardia, a Panamanian radio broadcaster, puts it this way, "More than anything, Torrijos wants to stay in power and, for that, he needs a new treaty for face-saving. But a system of joint defense will strengthen Panamanian militarism in the name of defending the Canal."

4) *"World Opinion"* and *"Our Latin American Neighbors."*

Liberal officials in Washington have a pathological dread of world opinion. A classic example of how this fixation produces decisions for disaster is the Bay of Pigs debacle. The United States had recruited, armed, trained and transported to the Cuban coast an assault brigade composed of Cuban patriots. But American involvement was supposed to be secret, undercover. Hence, when the Joint Chiefs chose an ideal invasion site that would permit the invaders to melt into nearby mountains if anything went wrong, President Kennedy vetoed the plan, claiming that a landing which had the earmarks of an invasion mounted by the United States a few miles from a coastal town would give everything away. World opinion, in other words, required the choice of another invasion site, even though strategically inferior.

Later, for the same reason, he ordered the first of three planned air strikes by the Cuban Air Squadron cut in half and the second and third cancelled altogether. When the tide of battle turned against the invaders because they lacked air support and the only chance for victory lay in the use of American power just over the horizon, it was denied. Promised supplies to the beaches were never delivered. The Cuban Brigade was abandoned to its fate and Castro's boast of how little Cuba, in three days, had defeated mighty Uncle Sam was heard around the world, relayed by Moscow. U.S. prestige in Latin America dropped to an all-time low. The invasion, instead of overthrowing Castro, entrenched him. "World opinion", for which the Washington liberals had been willing to sacrifice national honor now turned sharply against the United States. When patriotic Americans became aware of what had taken place, and why, their sorrow was compounded by humiliation and shame.

Those who fear "world opinion" seem never to realize that any adverse opinion subsides quickly in the face of accomplishment and strength. History never argues with success and a showing of strength, but rarely forgives weakness and failure. The Soviets by contrast are entirely indifferent to world opinion. They never permit adverse publicity to deter them from actions they consider beneficial to their nation. America's allies are inevitably appalled by a display of weakness on the part of the United States.

For any Administration spokesman to say that "people everywhere expect the United States to be able to work out an arrangement with Panama" giving up exclusive U.S. control and eventually surrendering the Canal is a calamitous misjudgment of realities. Exactly the opposite is the case. People everywhere in the Free World expect the United States to stand its ground against the threats of a Communist-oriented dictator of a tiny, weak and politically unstable country.

What about *"our Latin American neighbors?"*

Again, State Department officials, from Dr. Kissinger down, grossly misjudge Latin America and its people. They do not seem to realize that none of the nations to the south have "democratic representative government" in the American sense. Eight of the ten major countries are ruled by military men. In no case do their politicians reflect constituency opinions. Where the United States is involved in an issue, they publicly assume the stance of "David" in a David-Goliath confrontation, to show their courage and independence. But privately. among trusted friends, they talk otherwise. On such issues as the Panama Canal. the opinions they express publicly are so much demagogery, usually unrelated to their true opinions.

My wife Carmen and I are of pure Latin American lineage on both sides of both families and the roots of our families go back to the earliest colonial times. Carmen's ancestors arrived in the New World 28 years after Columbus and 100 years before the Pilgrims stepped on Plymouth Rock. Mine came 15 years later. We feel we know our people.

The almost universal reaction among the educated people of Latin America who are not politicians to a Promulgated Kissinger-Bunker giveaway treaty would be, at first, incredulity, then sadness and eventually ridicule and even contempt for the once greatly respected nation that had shown itself no longer to have the will to maintain its prestige and discharge its responsiblities.

My own and my wife's convictions on this score are supported by a distinguished military analyst, Gen. V.H. Krulak (Ret.) now on the editorial staff of the Copley newspapers. Writing in the summer 1975 issue of *Strategic Review* he stresses that the importance of U.S. control of the Panama Canal to the entire Hemisphere is "appreciated throughout Latin America, where all but far left governments see it as something quite different from the issue of anti-colonialism that has swept around the world."

Most Latin Americans, he believes, "in their own interest realize that the critical strip ... must never be permitted to fall into irresponsible hands." At a recent meeting of the Inter-American Press Association in Sao Paulo, Brazil, Gen. Krulak pointed out, "the attitude of Latin American publishers and editors was bold and clear." It was expressed by a Chilean delegate who told the United States: "You would be doing yourself and us a major disservice if you backed off one centimeter from your present position in Panama."

This view is particularly strong among Latin Americans aware of the Communist menace to our hemisphere. A Venezuelan at the Sao Paulo meeting, referring to the concessions to the Panamanian dictatorship already offered by Washington, stressed the futility of trying to appease Communism, by quoting Alexander Solzjenitsyn's warning against "short-sighted concessions, a process of giving up and giving up..."

Ambassador Bunker recently wrote:

> "Our job is to *make sure* that the public and Congress *have the facts* they need if they are going to make wise decisions about the Canal."

But in the speeches across the country State Department spokesmen withhold from their audiences the fact, *a)* that the Panama Isthmus is one of the most politically unstable areas in the world, and, *b)* that the United States is negotiating with a de facto government whose chief is a Communist-oriented military dictator.

Here is what the American people need to know about these vitally important aspects of the issue:

1) The sorry record of political turmoil on the Isthmus ante-dates the Panama revolution of 1903 by a great many years. During the 57 years preceding the founding of the Republic there were 53 political uprisings. One civil war lasted nearly three years, another nearly one year. The killings included Americans. On four occasions the Colombian government, then the sovereign, asked the United States to land troops to restore order and, in fact, Marines landed from U.S. warships on five occasions.

Since then the Republic of Panama has had 32 presidents in 72 years, an average of one every 2.25 years. The last upheaval occurred in 1968, when the duly elected President was overthrown by the National Guard which today rules the country under General Omar Torrijos. Like many former Panamanian politicians, the deposed President fled to the sanctuary of the Canal Zone, which has often served as a haven of refuge for Panamanian leaders seeking to escape assassination.

2) On January 10, 1976 dictator Torrijos publicly embraced dictator Fidel Castro in Havana, identifying his regime with that of the Cuban-Soviet axis. He announced that he welcomed Castro's backing in the attempt to wrest sovereignty over the Canal from the United States.

Before his departure for Cuba, State Department officials urged Torrijos not to mention the Panama Canal issue during his 5-day visit. Senator Jacob Javits, one of the leading pro-treaty advocates, was in Panama at the time and he added his coaching on how to avoid stirring increased hostility in Congress. Shamefully, these Americans were advising a foreign pigmy despot how to help the U.S. Government divest the United States of an asset of incalculable value to the security of their country, and to the maritime commerce of the world.

The Torrijos-Castro embrace came as no surprise to some of us, including Governor Ronald Reagan, who had issued the following statement four months earlier (September 12, 1975):

> "The incubation of the present Marxist government goes back a long way. When the Communist Party of Panama was founded in 1930, its charter spelled out two key goals; 1) Gain control of the Government through the Armed Forces; and 2) Nationalize the Canal Zone via treaty negotiations.
>
> Goal 1 was realized when, on October 11, 1968, the Armed Forces (called the National Guard) overthrew the newly inaugurated government of President Arnulfo Arias ... who had been an outspoken critic of Soviet designs on the Canal since his first election in 1940.

> "Slowly, over the years, a cadre of young, carefully indoctrinated Marxist military officers grew in size in the National Guard until it was strong enough to bring off the coup.
>
> "On seizing the government they immediately disbanded the National Assembly, censored the press and suspended civil rights. There hasn't been an election since. Today, the government speaks, not for the people of Panama, but for the guns of the National Guard. So far, it has succeeded in intimidating our State Department."

And the Panama-Cuba embrace could have come as no surprise to the State Department. In 1964 Ambassador Bunker announced that an assault on the Canal Zone which had taken place shortly before had been led by "persons trained in Communist countries for political action of the kind that took place" and that "the Government of Panama, instead of attempting to restore order, was, through a controlled press, television and radio, inciting the people to attack and to violence."

Joseph A. Califano, Jr., then Deputy Secretary of Defense, put it this way in 1964:

> "We know that some of the leaders were known and identifiable Communists, members of the Communist Party of Panama, and people who belonged to the vanguard of National Action, which is openly and proudly the Castro Communist Party in Panama."

Nor should the Panama-Communist Cuba embrace have come as any surprise to President Ford himself. In 1967, as House GOP leader, he had warned of the Communist menace to the Panama Canal from nearby Cuba. That was the time when the Johnson Administration, bowing to the coercion of the 1964 Panamanian riots, had offered to negotiate a treaty substantially similar to the present Kissinger-Bunker giveaway treaty. Here is what Congressman Ford said:

> "With Cuba under the control of the Soviets through its puppet Castro, and with increased Communist subversion in Latin America, a Communist threat to the Panama Canal is clearly a grave danger. The American people will be shocked by the terms of this (Johnson Administration) treaty"

But that was nine years ago and Congressman Ford is now President Ford and he has as his advisor on foreign affairs Dr. Henry Kissinger.

Today America has become immobilized by the spirit of detente, while the Soviets push forward confidently and successfully on all fronts.

Ambassador Bunker in his speeches across the nation has indulged in eloquent silence on the possibility of any Communist threat to the Canal. I charge that by withholding these important facts, certain to influence the judgment of his hearers, the spokesman for the U.S. Government commits a fraud.

SUMMARIZING

1) The giveaway advocates argue that it may be impossible to operate the Canal in a hostile environemnt. Hence, if we cannot make the Panamanians love the United States, we might as well kiss the Canal goodbye, gracefully, before we are kicked out. Opponents say, "No!" The armed forces of Panama consist of a national guard, which serves as a police force. The United States defense establishment is so formidable that if anyone damages a single U.S. property in the Zone—let alone tampers with locks, dams and spillways—he should be remanded to the nearest Canal Zone police court to be removed from mischief.

2) The State Department believes that meeting threats and insults with a smile is a mark of practical statesmanship. Opponents say, "No!" It is a mistake to raise the hopes of Panamanian politicians with bribes of promised concessions. Appeasement by the United States has become the order of so many days that Isthmian politicos take it for granted.

3) The State Department wishes to surrender exclusive American control over the Zone. Opponents say, "No!" It was a mark of wisdom that the great Theodore Roosevelt and his Secretary of State John Hay included in the Treaty of 1903 the provision for exclusive and perpetual American control. Without it, there could have been no stability in the operation.

"Perpetuity" does not seem so long when we remember that political stability has not emerged in the Isthmus during the 400 years that elapsed between the arrival of the great explorers and the arrival of American engineers and doctors who converted a deadly swampland into the finest man-made waterway in the world. Exclusive control is at least as important today as it was in 1903.

4) The claim that the Panama Canal has lost its strategic importance defies the facts and common sense. A few of our combat ships—only 13 of some 480—are too big to get through the Canal locks. But, to quote General Krulak again. "In truth the Panama Canal is an essential link between the naval forces of the United States deployed in the Atlantic and in the Pacific. It is only because of the waterway that we

are able to risk having what amounts to a bare-bones, one-ocean navy."

The Soviet Union has been acquiring ports of strategic importance all around the globe. Its latest effort in that connection is in Angola. Communist domination of the Canal, whether open or camouflaged, is a key objective of the Soviet navy master plan. If accomplished, Moscow and its puppets would be able to divide U.S. naval strength almost at will.

5) Within the framework of the retention of sovereignty, the United States should continue to deal with the people of Panama in friendship and fairness, as it has for 73 years. It should continue to make adjustments on the spot in non-essential treaty provisions, as it also has in the past. But the United States must negotiate with a Panamanian Government only on a no-nonsense basis. And let the word go out to "Torrijos & Co." that our solicitude for the Panamanians does not extend to a government that threatens, villifies and incites its population against the United States.

The American Legion
NATIONAL SECURITY ★ FOREIGN RELATIONS
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PANAMA ENTERS PRESIDENTIAL SWEEPSTAKES FOR 1980:-

President Carter's entry last week into the Panama Canal sweepstakes certifies there must be more to the new treaty with Panama than is publicly known. Plus, there must be some urgency or something Presidential involved. President Carter has urged the negotiators to get on with the new treaty. What could it be? What is there at the end of the Panama rainbow? What is the connection?

The Banking Connection: Banks and bankers have a way of influencing Presidents and nations. United States and their foreign branches banks have invested $2.77 billion in the Torrijos government. No one but Torrijos and his bookkeepers know the full extent of his government's indebtedness to banks other than the U.S. Could the total indebtedness run to $50 billion? Presumably the U.S. money was loaned on the strength of the Tack-Kissinger agreement of 1974 whose key provision is ceding all U.S. territory in the Canal Zone to the Republic of Panama.

If this happens, if the U.S. gives up its legal sovereignty and ownership, the rest of the agreement actually becomes irrelevant. The U.S. will do exactly as it is told by Torrijos. Treaty discussions have actually become so ludicrous in recent weeks that Torrijos is now asking $5.0 billion from the U.S. taxpayers in order to get him to take the $7.0 billion investment off our collective backs. How ludicrous can things get? Only a few months ago, Torrijos threatened force if the U.S. didn't come across. Now he wants payment to accept the heavy responsibility, or more likely, the banks who have loaned all the money want their interest--now!

One new bit of raw data has become available on the banking connection. The Republic National Bank of New York was listed until June 10, 1976 by the Department of Justice as Registered Agent #2604 for the Republic of Panama. If government investigators were searching for some real scandal, they could most likely find bags full of it in the banking connection. But the odds are against such an investigation. This may be one of those rare exceptions where money does not talk! So far, the banks have kept a stiff upper lip, despite the doubts they sometimes express about their billion dollar blunder.

The Business Connection: Apart from the banking connection, there are also the business interests which surface from time to time. Although Ambassador Sol Linowitz has publicly denied that oil pipelines and Alaskan oil have crept into the treaty discussion, there is a growing suspicion that Alaskan oil and the 4-Navy pipelines are very much involved in a business connection.

Recent announcements of a joint U.S.-Panamanian business venture to build a $40 million oil storage facility on Panamanian soil, is indicative of business activity. U.S. citizens do not object to any good business deals, but why keep secrets and especially if publicly owned property is in involved? Why increase the credibility gap between the government and the people?

The recent $100,000 contract between the Republic of Panama and Butler Associates of Tulsa, Oklahoma for a study on the transfer of oil by pipelines is indicative of more than passing interest in the commercial aspects of the developing oil situation. Butler Associates' lips are sealed and Torrijos is not talking, but many oil men know that John D. Rockefeller made a bigger fortune in transporting the oil from Ohio than in the actual pumping of it from the ground.

To make the business and banking connection even more plausible, Mr. Irving S. Shapiro, Board Chairman of Dupont, is also on the Board of Directors of Citicorp, a heavy lender to the Torrijos dictatorship. Also John D. Debutts, Board Chairman of AT&T, serves on the Board of Directors for Citicorp. The Torrijos regime is heavily indebted to Citicorp. Now, whether these business leaders, or others like them, ever discuss business, banking and international treaties at the same time, is not known. But it would seem reasonable that they would occasionally take more than a passing interest in the bankrupt condition of the Torrijos government and might even go so far as twist the arm of a President.

The Public Relations Pay-Off: Surely it can be said that never in U.S. history has so much public money been spent in an effort to convince the American people it was in their best interest to give away a territory in which they have invesged some $7.0 billion. The U.S. State Department has sponsored a nation-wide speakers bureau sending Panamanians, as well as U.S. speakers, across country all pumping out the same party line. This is the last U.S. colonial enclave, so-called by the Department of State's Alger Hiss shortly after WW II. Hiss listed the U.S. Canal Zone as occupied territory, and the Hiss judgment has filled the lecture halls of civil and college audiences from the mouths of tax paid lecturers.

Since September 1974, Ambassador Ellsworth Bunker has received an annual salary of $57,500 with the sole purpose of supporting the Canal give away. Ambassador Bunker's salary and expenses are all at taxpayers expense. Then two of America's brightest PRmen, F. Clifton White, PR adviser to Senator Barry Goldwater; and Joseph Neopolitan of Vice President Humphrey's campaign for the Presidency, were hired at $200,000 for a 6-months final effort to put the give away idea across on the basis that it served the national interest.

Meanwhile, on the other side, former Chairman of the Joint Chiefs of Staff, Admiral Thomas H. Moorer, USN Ret. said, the U.S. Canal Zone and Canal are absolutely vital to the security interests of the United States. No one knows and it would be difficult to estimate how much of the Taxpayers money has been spent by the U. S. State Department to consummate an idea which was created by a few bureaucrats, and once created, had to be supported to the bitter end, however wrong the original idea might have been.

The Communist Connection: Time was when many U.S. Congressmen thought the Soviet Union might be the prime mover behind the Panama Canal give away. Soviet strategists have made no secret of their ambition to control the four narrow sea passages which interconnect the worlds oceans. These are the Straits of Malacca and Bering, the Suez Canal and the Panama Canal.

Torrijos has visited Castro. These two have offered each other cooperation and support. Exactly what Castro has sent to Panama is anyone's guess. Our intelligence agencies don't tell us and neither does Panama G-2 Chief Colonel Manuel Noriega.

The Economic Pact signed on July 19, 1977 between the Soviet Union and the Republic of Panama is prima facie evidence of the Soviet Union's and Torrijos' common, long-range objectives. Thus far, there has been no U.S. publicity on the Soviet - Panama treaty whose provisions include establishing a Soviet bank in Panama, the building of a hydro-electric plant and comparable economic ties.

The American people do not know if there is a communist connection. They do know there are grounds for suspicion. The most recent polls indicate that 86% of our U. S. citizens oppose a give away of the Canal, the prime objective of the new treaty. Surely 86% of the American people can't be wrong and, in the final analysis, the American people will be heard.

SOVIET UNION AND PANAMA SIGN HISTORICAL PACT:-

For years, conservative organizations and prudent leaders have said, "The Russians are coming to Panama sooner or later." These prophecies have now been fulfilled. On July 19, 1977, according to a press story appearing July 20 in a Panamanian newspaper, the CRITICA,the Soviet Union and Panama signed an Economic Pact involving millions of rubles. This is significant since the Soviet Union and Panama do not have "official" diplomatic relations. According to the Soviet - Panama Treaty, some of the agree conditions include the following items:

1. The Soviet Union will construct in Panama a hydro-electric plant to provide a base for improving the Panamanian economy;

2. The Soviet Union is permitted to build, open and operate a bank on Panamanian territory;

3. The Soviet Union may utilize Panama's "Colon Free Zone" as an outlet for Soviet merchandise; which includes Old France Field in the Canal Zone;

4. The Soviet Union has agreed to purchase 50,000 tons of sugar from Panama under conditions described in the Pact beginning in 1978.

Torrijos' brother-in-law signed this pact for Panama and stated, "the signing of this document has great historical significance; not only for our country but for the American continent, who are always facing strong forces that represent a philosophy that is contrary to the destiny of Latin America." Thus, as if foreordained, in some medieval drama, the communist villain has arrived, as many American leaders had forecast. The play has begun, Soviet trade, power and influence are expanding in the Western Hemisphere. Cuba was phase one. Panama is phase two.

Former Commander-in-Chief, Pacific, Admiral John S. McCain, USN Ret., in his statement for the U.S. Senate Subcommittee on the Separation of Powers, candidly stated on July 29 that a Soviet naval task force will be operating in the Gulf/Caribbean area in the not too distant future. The floating guests will be most unwelcome visitors we have had in our nation's history. McCain went on to say that the United States should reclaim "Old France Field" in the U.S. Canal Zone, and develop it along with the U.S. Naval Air Station located nearby to establish an air capability to deal with this type of Soviet naval power in lieu of the U.S. Navy's steadily diminishing aircraft carrier capabilities.

Senate Hearings on Panama Stir Emotions: During the hearings before the Senate Subcommittee on the Separation of Powers Committee on Judiciary on July 22, 1977, hearings which Senator Helms accurately forecast would most likely remain secret because the news media would not see fit to report it, the four Senators: Allen, Hatch, Helms and Scott, pressed each witness for the logic behind the "give-away" of the Panama Canal.

During the testimony of former Chairman of the Joint Chiefs of Staff, Admiral Thomas H. Moorer, USN Ret., one Senator blurted in a not so senatorial manner and more out of frustration than in anger, "What the Hell is wrong with the State Department?" Admiral Moorer replied matter-of-factly that this was not his jurisdiction.

Moorer was called the best qualified man in the United States to speak on the Panama Canal, and he was an impressive witness. Senator Allen called Moorer's testimony "unanswerable and unassailable." Moorer stated simply that any Chairman of the Joint Chiefs of Staff "will immediately perceive that it is vital to the United States' interest to retain ownership and control of the Panama Canal."

Moorer recalled how he, as Commander-in-Chief, Pacific had relied on the Panama Canal for support of his forces in Vietnam. Without use of the Canal, "The war in Vietnam would have been much more difficult and costly to conduct," he said. Then as Commander-in-Chief, Atlantic, he said the Panama Canal was especially needed for rapid transfer of troops and amphibious lift during one of the Caribbean crises and also during the Middle East war of that period. As Chief of Naval Operations, Moorer said, he looked to the Panama Canal as a means of equalizing the strength and providing the balance between the Atlantic and Pacific Fleets. Without the Canal, the United States would have to build a two-ocean Navy costing billions of dollars.

Speaking of the danger of Soviet sovereignty by proxy through Cuba, Moorer said, "I was convinced as Chairman of the Joint Chiefs of Staff--and I remain convinced today--that if the Soviet Union ever gained even proxy sovereignty through Cuba, the U.S.

security as well as U.S. prosperity would be placed in serious jeopardy." Moorer's testimony followed by three days the Soviet-Panama Pact which would indicated Soviet involvement may come in a more direct manner than by proxy.

After listening to Moorer, one Senator recalled that General George Brown had told him the Panama Canal was "important" but not "vital" to U.S. security. Moorer replied that, in his judgment, "it was vital," and the point is, said Moorer, "there is no point in surrendering this vital interest."

The constitutional issue on the separation of powers should be ignored according to one witness, Senator Gravel, and the United States ought to give the "old and obsolete" Canal to Panama and dig a new one at sea-level in Panamanian territory, so that Alaskan oil would have a better flow rate to the U.S. East Coast. "The new canal would also be built for about $5.9 billion. This would be done at U.S. taxpayers expense and then given to Panama to insure Panama's friendship and gratitude," said Gravel. He said Secretary of State Vance was enthusiastic about building a new canal at sea-level.

Senator Allen. Your statement previously given to the committee appears on page 53 of part 2 of these hearings. They have just been printed.

Would you prefer that we come back immediately after the vote or break for lunch?

Mr. Crane. I think, Mr. Chairman, since I have a conflict with a lunch, too, that if it suits the Chair I would prefer to continue after you have voted.

Senator Allen. We will continue your testimony then. Mr. Flood, if you can come back, we would like to address a few questions to you; but we will leave that up to you.

Mr. Flood. I believe the B-1 voting will keep me busy.

Senator Allen. We appreciate your appearance here, Mr. Flood. We appreciate your leadership on this issue. Your leadership has been exceptionally fine. We hope that you will be able to exert your leadership in the House when this issue is brought before the House.

Mr. Flood. I am just a pale shadow of you, Mr. Chairman.

Senator Allen. Well, you have done a great job.

We are coming back immediately after the vote.

[Recess taken.]

Senator Allen. The committee will be in order.

Mr. Crane, we are delighted to have you come before the committee to give us the benefit of your views. Please proceed.

TESTIMONY OF HON. PHILIP M. CRANE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Crane. Thank you very much, Mr. Chairman.

I am indeed grateful to you and to the subcommittee for permitting me to appear and testify today.

I would like to make a reference to my distinguished colleague who left the room earlier, who was appearing today jointly with me. I am referring to Congressman Dan Flood, who, as you know, has had a long-time active interest in this issue, undoubtedly more so than any other Member of the House. His counsel on this question carries greater weight certainly than my own, and probably more than any of my colleagues in the House.

I might relate a quick anecdote, if I may. Before doing so, I would make a unanimous consent request that my prepared statement might be a part of the record.

Senator Allen. Without objection, so ordered.

[Material follows:]

CONGRESSMAN CRANE'S PREPARED STATEMENT

"THE PANAMA CANAL TREATY: A QUESTION OF JURISDICTION"
SENATE SUBCOMMITTEE ON SEPARATION OF POWERS
SEPTEMBER 8, 1977

Mr. Chairman:

I am indeed grateful to you and the other members of this subcommittee for having me here this morning. To my way of thinking, the proposed Panama Canal treaty is one of the, if not the, most important issues to come before Congress in recent years and not the least of the problems with it is this question of jurisdiction. Unquestionably, the President had the right to negotiate the treaty and without doubt the Senate has an obligation to either ratify or reject it; the question is, will the House of Representatives have the opportunity to pass on it also.

As a sponsor of a resolution calling for authorization by both the House and Senate before any giveaway of U.S. territory or property in the Canal Zone is implemented, I am not exactly an objective, disinterested party to the debate over this question. Moreover, as one who feels that there are enough things wrong with this treaty to warrant its rejection regardless of the jurisdiction question, I have a vested interest in seeing this treaty brought to a vote as many times as possible thereby increasing the chances of its defeat. But, having thus identified my biases, let me stress my real belief, based on the language of Article IV, Section 3, Clause 2 of the Constitution, subsequent Supreme Court decisions and past precedent, that a powerful argument can be made for House participation in the great canal debate.

Just for the record, Article IV, Section 3, Clause 2 states that: "Congress shall have power to dispose of, and make all Rules and Regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." While it has been argued that, when read with Article II, Section 2, Clause 2 (giving the President the power to negotiate treaties) and Article VI, Section 2 (making treaties the supreme law of the land), this clause constitutes a concurrent grant of power (thus making it unnecessary for the President to consult the House), the Supreme Court has recognized Article IV, Section 2, Clause 2 as an exclusive grant of power to Congress vis-a-vis federal-state relations and has never circumscribed that power in a treatymaking context. Moreover, the Congress has repeatedly asserted its exclusive right under the clause in question and both the President and the Senate have recognized that right in the past. In fact, on at least three occasions, the House, as well as the Senate, has been involved in relatively minor territorial matters involving the Canal Zone. Admittedly, none of these episodes quite parallels the situation we face today, but if it has been deemed appropriate for the House of Representatives to be involved in relatively minor matters -- such as the temporary cession of a small plot of territory to Panama so that the U. S. government could buid a legation -- then it stands to reason that it should be involved in what could turn out to be the biggest giveaway in American history.

All rhetoric aside, the facts of the matter are that the United States has spent $163.7 million to acquire rights and title to the Canal and Canal Zone, to say nothing of the $366 million in construction costs and the $6.35 billion over the years that went for operation, administration and defense. Just the $163.7 million for title and rights represents more money than it cost the U.S. to acquire all the rest of its territorial additions combined. And now it is proposed that we not only give this entire investment away but that we pay Panama almost $2 billion more between now and the year 2000 for taking it. The very thought of such an incredible arrangement simply boggles the mind,and the American taxpayers who have footed most of the bill, and who will be expected to continue to do so, have every right to be upset at the prospect. In fact, they have every right to hold each and every one of us personally accountable -- which is yet another reason why the House of Representatives should pass judgment on this unparalleled example of misguided generosity.

Actually, misguided generosity may be too kind a term -- boondoggle is more like it. It is no secret that one reason the Panamanians insisted that we raise our annuity and gratuity payment from $2.3 million a year to at least $50 million and perhaps as high as $70 million, is that 39% of Panama's annual budget goes to servicing their national debt and they have almost $325 million in debt coming due this year. Significantly, much of the debt is held by banks in the United States and the $50 million, plus perhaps some of the economic aid money also promised Panama, would come in handy in paying them off. So, what it appears we really have here is not just aid to a tinhorn dictator but a bailout of a number of banks which should have known better than to in.est in Panama and, in any event, should not escape responsibility for having done so. If liberals can oppose bailing out Lockheed and conservatives are opposed to bailing out New York City, then there is no reason why all of us should not oppose bailing out Panama and those bankers who inadvisedly lent financial support to its dictator. Certainly, the American taxpayer should not be made to bear the burden for the mistakes of others.

Perhaps the most frequently used argument in favor of the proposed treaty is that, if we don't ratify it, there will be violence, sabotage and perhaps warfare and the canal will be shut down. In support of this logic, treaty proponents point to statements by military leaders to the effect that, in the event of violence or sabotage, they cannot guarantee that our armed forces could keep the canal open all the time. However, I feel sure that if you asked those same leaders if they could guarantee that Metro would never fall victim to sabotage, they would also have to say no -- as they would in the case of almost any other major transportation facility. Maybe the answer is to give Metro to the Panamanians as payment for taking the canal over but, unless you believe that, the violence and sabotage argument simply doesn't hold water. Just because there is a little risk in an investment such as a transportation system does not mean we should give it away.

Finally, I suspect that if we go through with such a giveaway, it will not be viewed as a gesture of generosity but as a sign of weakness. For all their talk about "Yanqui go home" -- talk that has been staple political fare for generations -- Latin Americans respect us more when we show our strength. Instead of American prestige sinking to a low ebb in Latin America after the missile crisis of 1962 or the Dominican crisis of 1965 just the reverse occurred and so it will be in the future if we demonstrate the willpower that made us a world power.

Willpower -- that is the key. More than anything else, this canal treaty is a test of American willpower. If we are willing to give up our legitimate, and long since paid for,claim to sovereignty over the Canal Zone, others will wonder if there is anything we won't be willing to give up. On the other hand, if we reject this treaty, we will have demonstrated that we have not entirely lost our intestinal fortitude and that we are still capable of standing up for what is rightfully ours in the face of criticism. In this context, we should keep in mind that America has nothing to be ashamed of relative to the canal; without the original canal treaty (of 1903) Panama would, most likely, still be a province of Colombia and it certainly wouldn't have the fourth highest per capita income in Latin America.

Mr. Chairman, I beg your pardon for I have gone on too long, but I feel very strongly about this issue and about the fact that it is time for the Congress to stand up and be counted. And while I can't speak on their behalf, I think you will find a number of other Members of Congress who feel much as I do and want to have a chance to vote on this matter. With all due respect, I believe that we are entitled to have such a vote, and I hope that this subcommittee will see fit to make that very recommendation.

Again, thank you for your indulgence. If you have any questions I will be more than happy to try and answer them.

Mr. Crane. Congressman Flood appeared with me on "The Advocates," the public service television program, back about 3 or 4 years ago. I believe it was 1974. We argued this question of whether to give away the Panama Canal. Dan Flood was, of course, the most eloquent witness that we had on our side.

The returns of that program were most intriguing. The program appealed to listeners to send communications to the station indicating which side they supported. By the very lopsided margin of 89 percent support for our position, they upheld the position that I would advance today in opposition to alienating any portion of the canal or the zone.

The thing that was intriguing about the return was that the producers of the show acknowledged to us that their viewing audience was more liberal philosophically than conservative. So, the returns were doubly surprising to them.

I think, Mr. Chairman, that this is an issue that is neither ideological nor partisan. It is a question of what is in America's interest. In that connection, I would only put some stress on a couple of points. One is the national strategic interest of the canal. As we all know, Congress seems ill-disposed to beef up our national defense, notwithstanding the evidence that the Soviets are engaged in the most massive military buildup since Hitler's Germany.

That being the case, we are potentially creating a situation that would necessitate having a two-ocean navy if we did not have absolute control over the canal and the Canal Zone. Contrary to the impression left by the President—and it is a point that probably already has been referred to—there are only 13 of our combat naval vessels that cannot pass through the canal; those are the aircraft carriers.

I think there is also, from an economic point of view, a point that needs stressing. That is that almost 70 percent of the shipping that passes through that canal is bound for or originates in U.S. ports. This takes on added significance when we realize that the President made the decision not to permit any of the Alaskan oil to be sent to Japan in a tradeoff with Japanese oil from Persian Gulf. This means that great quantities of oil will be passing through the Panama Canal for refining in our eastern States.

I think that is one of the reasons why we have found such pronounced objections to the treaty coming from the Governors of such great States as Texas and Louisiana, major port States.

In addition to that, Mr. Chairman, there is one other point that I would stress. That is the potential conflict of interest represented by Mr. Linowitz' interest in Marine Midland Bank and the loans of that bank to the Republic of Panama. There is also Mr. Kissinger's potential conflict of interest serving on the board of Chase Manhattan Bank, and that major bank's interest in loans that it has extended to the Republic of Panama.

In fact, I think, when one examines the magnitude of loans by both domestic U.S. banks and their foreign branches, that the total amount of loans to that tiny country of Panama amounts to about $1.5 billion. Thirty-nine percent of Panama's budget right now is being extended to service debt.

Very frankly, I find it hard to believe that the banks, with that magnitude of interest there, have not attempted to exert some influence not only on people in government, but I suspect that in the business community as well. I even wonder whether conceivably there may not be some interest that they have exerted over some of our national TV networks.

Last night I heard Howard K. Smith come out editorially for ABC in support of the canal giveaway; the night before, Eric Severeid very forthrightly came out in support of the treaty. I do not know yet what NBC's position is. But it does seem to me that that is an area of potential conflict of interest that warrants serious investigation.

The only other point I would make, Mr. Chairman, has to do with this question of separation of powers and the primary concern of the subcommittee. I would cite and read from the testimony by the legislative attorney for the American Law Division of the Library of Congress, Mr. Kenneth Merrin.

> It is clear that Congress has often asserted an exclusive right to dispose of Federal territory and property. It is also apparent that both the Executive and the Senate have recognized that claim in past dispositions of property in the Canal Zone to Panama. Therefore, while it is impossible to make a categorical assertion that article IV, section 3, clause 2 is either exclusive or concurrent, it appears that those powers have been recognized as exclusive for purposes of disposal of property in the Canal Zone to Panama.

Of course, those were inconsequential dispositions of property in contrast to what we are contemplating here today.

I think the virtue of guaranteeing that the entire Congress cast a vote on this is that the Founding Fathers, in their wisdom, initially assumed that you gentlemen in this body would be representing States and simultaneously that those of us serving in the House would be representing people. Both entities should have a voice on so serious a subject.

POLLS CONSISTENT

If one examined the polls on this subject, they show overwhelming opposition to ratification of this treaty.

Opinion Research, for example, conducted one recently indicating 76 percent opposition. The American Conservative Union polled senatorial offices just about a week and a half ago; 66 Senators responded to that poll. The opposition to the treaty was running about 94 percent.

I have spoken to colleagues in both the House and the Senate who have put this question on questionnaires to their districts. The opposition runs about 90 percent.

The Council on Inter-American Security, which has been polling on this subject for the previous 3 months, has had consistent returns in the neighborhood of 90 percent opposition.

So, I would hope and pray that the House indeed would be forced to render a judgment on this. General Torrijos, the dictator of Panama, indicates that there will be some kind of national plebiscite or referendum to determine whether Panamanians support it. I would not trust any referendum conducted by any dictator.

On the other hand, I think that we can have the closest thing to a national referendum if we guarantee that those people who are represented in government, the American electorate, have an opportunity to render a judgment on the merits of this treaty. They can do that with their votes in the congressional elections of 1978.

It seems to me that, based not only on the historical precedence, but I think the unequivocal language of the U.S. Supreme Court, from *Wilson* v. *Shaw* in 1907 down through the last decision in 1974, that the Supreme Court has clearly upheld the fact that the United States owns that Canal Zone. We are sovereign in that zone.

We could never even have begun the construction of the zone had that not been the case from a constitutional point of view. That being the case, the article IV, section 3, clause 2 provision of the Constitution it seems would clearly indicate that the Senate and the House should both render a judgment. It would be my hope and prayer, very frankly, that that judgment would be consistent with what are in America's long term best interests.

That, in my judgment, is not running away from this situation but facing up to it foursquare, acknowledging that we have not only economic and national security interests involved, but so does the entire free world for that matter. In that sense, the United States would be doing a disservice to free world interests to contemplate yielding up this canal to probably one of the tiniest countries in Christendom that is not even in a situation to exercise self government or enjoy human rights so long as it is under the repressive regime of General Torrijos.

Senator ALLEN. Thank you very much, Mr. Crane. You made a fine statement.

Does the administration give any indication, other than holding briefing sessions, that it is going to submit any portion of the treaty or the conveyance of the property to the House?

Mr. CRANE. To the best of my knowledge, no, sir.

Senator ALLEN. What do you feel the sentiment of the House is on this question?

Mr. CRANE. I think sir, that at the present time—an overwhelming majority would vote against alienation of the canal.

I think that that majority is going to grow with the increasing communications from constituents. My mail—and I have not yet solicited any input from my district through a questionnaire—has run about 7,000 letters. So far, I have two letters supporting alienation of the canal. All of the rest are violently opposed.

During the August recess when I was home, I had people coming up to me identifying themselves as Democrats and Republicans indicating that it was their sincere hope that we would not consider giving up our canal. I did not have one individual approach me during the August recess supporting alienation.

As best I can determine in the House, as in the Senate, that sentiment is overwhelming in opposition to alienation. I think House Members, of course all being up for election in 1978, will be a lot more accountable to the views of their constituents.

Senator ALLEN. Do you feel that a delay in the taking of action by the Senate and the House would improve the treaty's chances of being ratified? Or would it harm the chances?

Mr. CRANE. My own feeling, Mr. Chairman, is that time is not on the side of the State Department or the administration on this question.

The argument has been advanced by the administration that they will educate the public to an understanding of the merits of the giveaway. It seems to me, having listened to most of the arguments that they have put forth to date, that they are easily refuted and that, as Americans become more apprised of the significance, economically and strategically of that canal, they will be hardened in their position of opposition rather than weakened.

Senator ALLEN. Why should the canal be given away and the Panamanians paid to take it?

Mr. CRANE. Well, if I were David Rockefeller, I could give you a very easy answer to that. That would be the servicing of my loans and the loans of many of those big New York banks. We are contemplating not only giving the canal away but, of course, reimbursing the Panamanian Government to the tune of $50 to $70 million a year on top of that.

I can clearly understand the banks' position. What I find it difficult to understand is the position of those who would side—maybe coincidentally—with the major banks in the United States. They are some of the same people who voted against the Lockheed bailout. They are some of the same people who also voted against bailing out New York City. I think they were right on those issues. The banks should have assumed the responsibility for bad loans they have made.

I think the banks in this instance should assume responsibility for bad loans that they have made. Beyond that very selfish and narrow interest of our big banks, frankly, I cannot figure out any valid reason why any elected Representative or Senator should be supporting this treaty.

Senator ALLEN. Is it carrying good-neighborliness too far?

Mr. CRANE. I think it is more than carrying good-neighborliness too far, Mr. Chairman. I think it is a demonstration of a point that Governor Reagan stressed earlier: American weakness. There is movement in the direction of fortress American in an era when no great nation of the world can afford to isolate itself.

Second, when I put this within the context of what we are doing with Cuba, what we have done thus far in Rhodesia, the cold war relationship we are setting up with the Republic of South Africa, the fact that we are no nearer solutions with Greece and Turkey over the hot issue of Cyprus, the fact that Italy and France are threatening internally to go Communist, and Great Britain is no longer a major component of NATO, that we are contemplating severing our ties with Nationalist China, and simultaneously contemplating withdrawing from South Korea, we are establishing a frightening and appalling foreign policy trend. I would say that we have gone, in terms of our foreign policy, from containment—when the boast was properly made that the President of the United States was the most powerful man in the world and we clearly controlled the air spaces of the world and the sea lanes and we had overwhelming missile superiority to détente which Frank Barnett has described détente as the word to describe the gravesite of containment. What appears to have followed détente is in many respects a very old policy; that is appeasement.

We seem to be doing the greatest violence to our friends and simultaneously seeking to make accommodations through appeasement with those people committed to our destruction.

DECLINING AMERICAN STRENGTH

Senator ALLEN. If the treaty is ratified, would this, in your judgment, foreshadow a declining influence and prestige around the world for the United States?

Mr. CRANE. I think, Mr. Chairman, we are already suffering a declining influence and prestige. I think, in fact, our performance in the Republic of South Vietnam was certainly one of the sorriest chapters in the American national record.

I think what has transpired since then in terms of the United States' unwillingness to exercise an appropriate veto to keep those people out of the United Nations, our great silence on the human rights question with Cambodia, where an estimated one-fifth of the population has been systematically exterminated since the Communists came to power, the betrayal of allies and then finally capitulation on a point here, where there is no dispute by responsible authorities over whether it is American territory, can only be viewed with great glee and satisfaction if one sits in the politburo.

The United States is either a crippled giant or a giant that lacks any will to stand up and be heard, to provide leadership against aggression. I think another evidence of this was the sorry performance of this country with respect to the most adventuresome action the Soviets have taken in the postwar era. That was to subsidize mercenaries in Angola to suppress an indigenous nationalist movement.

NO RIGHT TO INTERVENE TO REQUIRE NEUTRALITY

Senator ALLEN. Much has been said about the preservation of the right of the United States to intervene to protect the neutrality of the canal after the year 2000. Do you find, in your study of the treaty, any provision granting to the United States a right to intervene to protect the neutrality of the canal?

Mr. CRANE. Mr. Chairman, I do not.

I think, in that connection, one must examine the provisions of that treaty side by side with the statements made by Dr. Romulo Escobar Bethancourt before the Panamanian National Assembly on August 19. There, Dr. Escobar made this specific statement:

"We are not giving the United States the right of intervention." He goes on to make further observations that I think have to be disproven by those American negotiators who are championing this treaty. They cannot disprove the statements based upon the contents of the treaty, as I have read it, and I think any other reasonable person would read it.

This includes the flat-out refusal to guarantee the right of intervention to the United States to preserve the neutrality of the canal or to defend it after the year 2000, but even to guarantee the neutrality of the canal. They insisted that they could not make an absolute guarantee of the neutrality in time of internal insurrection, according to Dr. Escobar.

We backed off of that kind of a qualifying statement. We did not want that in the record as a spelled-out provision. So, the treaty is silent on that point. Dr. Escobar says, however, they flatly refused under that condition to guarantee the neutrality of the canal.

I think, in addition to that, there are other assurances that we have heard from some of the administration spokesmen that are refuted or challenged by Dr. Escobar. One of these is the assumption that we would have some kind of preferential treatment for passage of our war vessels or commercial vessels during time of war. Dr. Escobar rejects that. He says there is absolutely no such guarantee; we will be treated as any other country. That means, if we were at war with the Soviets, Soviet vessels in line would actually be going through the canal before our own.

In addition to that, the Panamanian Government would not guarantee that the canal will be kept open under any and all circumstances. They commented on the possibility of earthquakes and landslides; those are reasonable conditions under which one might not be able to continue to maintain the operation of the canal. But they said, further, that if it was not profitable, they would not maintain it. We responded by saying that, if that were the case, we or other nations could help bail them out. They still rejected putting any language in there giving a positive guarantee that the canal would be kept open.

It seems to me that the burden of proof is on the administration to take the Escobar speech and to demonstrate, by analyzing provisions of the treaty, the falsity of the remarks made by Dr. Escobar or else explain to us why he is very specific in his reference to these points and the treaty manages to be most elusive and vague in commenting on any one of them.

Senator ALLEN. Thank you very much for your fine testimony. My time is up. Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

JOINT CHIEFS NOT ALLOWED TO SPEAK FREELY

I have heard all these arguments that the Joint Chiefs of Staff support this and therefore we should support it. Do you have any comments with regard to that?

Mr. CRANE. Yes, indeed. I think that one of the most important points that was raised at the time of General Singlaub's removal was that, henceforth, nobody serving in the military would have the freedom to speak out forcefully on any issue contrary to an administration position.

In effect, what we have managed successfully to do is to gag the military on this point.

Senator HATCH. Do you have any other evidence that that has taken place in the military?

Mr. CRANE. I think one can speculate on the position of the Joint Chiefs, which I am doing. On the other hand, considering what happened to General Singlaub, I think it is reasonable speculation. The point was covered in many newspaper commentaries, both liberal and conservative. I think, if you look at the testimony of Adm. Thomas Moorer, former head of the Joint Chiefs of Staff, he specifically made reference to that point.

Senator HATCH. Can I interrupt you there for a second? I think the public has not been told how important Admiral Moorer's testimony is or the testimony of the other admirals who have testified here.

Moorer said in his statement:

> My evaluation of this waterway is that it is an invaluable possession of the United States, which I testified in 1962. At that time, I was Commander of the 7th Fleet operating in the Western Pacific. Frequently, my fleet's capability depended on prompt arrival of supplies in the Atlantic Seaboard, supplies loaded on board ships which were using the Panama Canal.

Then he goes on to say:

> From the 7th Fleet, I went on to Commander in Chief of the Pacific; from there, to Commander in Chief of the Atlantic and NATO Supreme Allied Commander, Atlantic; from there, to Chief of Naval Operations; and from there to Chairman of the Joint Chiefs of Staff from 1970 to 1974.

Now, that is what the American people are not being told. Admiral Moorer is a man who really has no axes to grind. He is not subject to administration pressures. He cannot lose his pension. He and the three other admirals, all of whom are highly distinguished admirals, are saying this treaty would be very detrimental to the U.S. interests.

I am glad you brought that up. It gave me a chance to put that in the record. I think that is important.

Mr. Crane. There is testimony also by Gen. Daniel Graham, former head of the Defense Intelligence Agency. General Graham's testimony is equally forceful on this point. I think, as Admiral Moorer observed—and this, of course, is brought home strongly to anyone who still wears the uniform and is serving—one must think twice about the possibility of speaking out in objection to policy decisions made by the Commander in Chief, unless one is prepared to contemplate the possibility of being forced into early retirement and maybe even some humiliation. It will be my expectation that you will have, publicly, a very compliant Joint Chiefs of Staff.

Senator Hatch. You make some very serious allegations about the conflict of interest problems here. Mr. Linowitz told me personally that he did not feel he had any conflict of interest, although he was on the board of directors of Marine Midland Bank. If I recall right, he also joined the board of directors of PanAm. Both of them reputely have huge interests down there in the debt structure of Panama.

Do you have any comments with regard to that?

DEBT OBLIGATION

Mr. Crane. I cannot help but feel that, where your treasure is, there will your heart be also. That's what the Bible says. The banks have quite a treasure down there, and in this instance I fear that their hearts are in Panama and not in the United States.

Imagine a community of roughly 1.5 million population taking on a $1.5 billion debt obligation just from these banks here in the United States, mostly centered in New York. I think that is an insurmountable debt burden.

My understanding is that they are faced with the prospect of defaulting in Panama on just some of the interest payments on that debt. So, obviously, they have got to figure out how to come up with new income from some source. I am sure the banks know what their situation is like. The banks are undoubtedly salivating to see new revenues pumped into Panama to service those debts.

I would hope that maybe here in the Senate there might be some more intensive investigation of who serves on the boards of those banks. What are the kinds of business connections that some of those board members have with other major corporations that are pumping aggressively for treaty ratification? Find out particularly who within government——

Senator HATCH. Do you recommend this to this committee?

Mr. CRANE. I would very definitely recommend that.

Senator HATCH. When I was down there, I met with the President of Panama and Mr. Barletta, who is the Minister of Planning and Economic Affairs, if I remember the title correctly. They admitted to me—and I have a document provided to me by the American Ambassador, who told me that Mr. Barletta—and Mr. Barletta confirmed in our meeting with him—that they have at least $1.4 billion in public debt owed to banks. In fact, the largest of the banks were the First National City Bank of New York and Chase Manhattan Bank in New York.

As I understand it, you are indicating here that you believe that part of the reason for the rush in the last few hours of Mr. Linowitz' 6-months appointment—and, of course, he has been criticized in some conservative magazines I have read—that his appointment was premeditated so that he would not have to appear before the Senate during the normal confirmation process to justify his credentials—you have indicated that the reason that was so and the reason that they finally came to this conclusion in the last few hours of the 6-months appointment was because they had the deal of a lifetime and that there are other interests that are to be very much benefited from this canal treaty, much to the detriment of the American taxpayers.

Mr. CRANE. I remember when I served on the Banking and Currency Committee in the House at the time of the hearings on the Lockheed bailout. I witnessed the spectacle of 38 heads of the biggest banks in the U.S. sitting there before our chairman, Mr. Patman. They were like schoolchildren with one mike servicing all 38. They had questions put to them, and they raised their hands if they agreed or disagreed.

They put up with that for 1 full day to get the guarantee of the backup by the U.S. Treasury of the loans they wanted to extend to Lockheed.

So, I know that the banks are willing to suffer—at least in that instance—I think a great deal of humiliation as a means of trying to get that kind of Government guarantee. If they were willing to do that on a paltry sum involved, relatively speaking, with the Lockheed Corp., I cannot help but feel that they would go to much greater lengths to try and salvage a $1.5 billion investment that they have made in tiny Panama.

Senator HATCH. You have also indicated, have you not, that Mr. Linowitz has direct interest as a result of legal affiliations, banking affiliations, and otherwise in this treaty going through in a favorable manner?

Mr. CRANE. My understanding is, in the face of heat and criticism, he stepped down from the board of Marine Midland in March, but well after his appointment. On the other hand, if this treaty were very quickly ratified, I am sure that, if Marine Midland viewed his talents to be so considerable then it would not be very long before he were retendered an offer to sit on the board of Marine Midland or maybe Chase Manhattan.

Senator HATCH. Our research shows that, when General Torrijos took over the government in 1968, that Panama had a total debt structure of about $139 million. You have indicated here today that they owe some $2.7 billion to just the banks. I have indicated—and there is no question about it—that their leadership has admitted to a public debt alone of about $1.5 billion.

Do you have any reasons that you can give how that public debt could have jumped from $139 million to $1.5 billion or as high as $2.7 billion?

Senator ALLEN. Excuse me for interrupting, but they have just started to vote over at the House.

Mr. CRANE. I can respond quickly and then vote on the B–1 bomber.

I would say that that very question is what warrants the investigation that I would hope the Senate might take up. I have spoken to members of the Banking and Currency Committee in the House. Unfortunately, they feel that the prospects are rather remote of getting hearings and an inquiry into that subject.

But the figures I have seen include approximately $850 million of loans by domestic banks and through their foreign branches, though, the additional loans total $2.7 billion. It could conceivably be higher than that.

There have also been rumors, of course, that some of those moneys have been siphoned off by Torrijos himself and spirited away into unnamed Swiss bank accounts to feather his own nest. Knowing the moral quality of the man, I find that easy to believe.

This is what ought to be brought out, I think, in any public discussion before either the House or the Senate acts on this question of alienation of that canal.

Consider two other quick points. One is, if we relinquish sovereignty, then that canal becomes, in effect, a multinational corporation. The United Nations has already upheld the right of expropriation.

So, I think we would be very hard pressed to argue that it is ours in the face of criticism that we would receive if they simply wanted to abrogate any terms or any agreements that they made with us up to that point.

I think this, coupled with the fact that gunboat diplomacy started primarily because one illegitimate government—by illegimate, I mean an unconstitutional government; one that came to power by force—would negotiate loans with a major foreign country such as Great Britain. A coup would take place, and one illegitimate government would be replaced by one that claimed to be legitimate and represent the interests of the people and that they were not responsible for the agreements made by a previous administration because it was an unconstitutional government.

Of course, what happened was Great Britain would send the gunboats in, take over the customs house, and put their affairs in order, and service their debts.

All I am suggesting is this. Since Torrijos is not a constitutional leader down there, since Torrijos came to power by violence and he retains his position by violence and repression, there is the very real prospect that a succeeding government, a truly representative government, might have a powerful case to repudiate any obligations assumed by one man, a single dictator not speaking for the people of Panama.

Senator SCOTT. Mr. Chairman, I would like to respond to that.

Time will not permit me to examine my former colleague and friend during the time he is before us. But you mention Torrijos and how he came to power.

Do you feel that, with his background, that he has a right to lecture the Senate as to looking to the future rather than to the next election, as he did last night at the signing of the treaty? Is he in a position to do this?

Mr. CRANE. I think that man has no moral qualifications to lecture anybody on anything unless they want a little locker room dissertation on prostitution in Panama, living off the backs of oppressed working people, stealing from the citizenry of the Republic of Panama, and imposing violence and repression against innocent people there.

That is hardly a man that I would dignify by even acknowledging his existence, much less by negotiating with him to give away a precious $7 billion American possession.

Senator ALLEN. Thank you very much.

Mr. CRANE. Thank you, sir.

Senator ALLEN. We are now going to recess for lunch until 2 o'clock. At 2 o'clock the hearing will be continued.

[Recess taken.]

AFTERNOON SESSION

Senator ALLEN. The meeting will please come to order.

Our next witness is Adm. John S. McCain, Jr., U.S. Navy, retired, former Commander in Chief of the Pacific Fleet.

Admiral McCain, we're delighted to have you come and give us the benefit of your views. We regard you as a great American patriot and we are certainly interested in learning of your views for the record. We invite you to proceed in such a way as you see fit.

TESTIMONY OF ADM. JOHN S. McCAIN, U.S. NAVY (Retired)

Admiral MCCAIN. Thank you, sir. Senator, I consider it a great honor and a privilege to have been invited up here before your distinguished committee to make any comments or statements I want to make as far as the Canal Zone in Panama is concerned.

I would like to make a couple of comments before I go into my statement. One, the United States is in grave danger. The Panama Canal and the Canal Zone problem is a lot broader than just the use of that body of water. We are faced worldwide with advancing communism. Just to give you an example, in the last 4 or 5 years of my naval career—I've now been retired about 4 years—it has become impossible to go into Southeast Asia. It has become impossible to go into the Middle East with impunity. We have the problem of Castro in Cuba in our backyard. We now also have the problem of Torrijos and the Canal Zone.

What is actually happening is that the United States is becoming more and more constrained and constricted to the continent of North America. You might in one sense say that the Berlin wall is being taken brick by brick and moved around the continent of North America. The United States is being restricted to this area.

I cannot emphasize this enough. It is a process that is going on day after day, night after night. Unless the United States itself begins to take a strong stand—and the Republic of Panama and Canal Zone is one—then we are going to lose this battle.

It is incredible to me that men who should understand these matters apparently do not. The business of an obsequious approach to nations throughout the world—I speak for example of Peking, of Moscow, and of the handling of the United States in the case when our own helicopter was shot down in Korea, and many others I could mention to you.

I also would like to mention that concurrently we have difficulties in the Philippines. That is the two bases, Subic Bay, the naval base, and Clark Air Force Base. If we lose those two bases that is a further retraction from the Far East. Though we were successful in getting through approval of the use of Diego Garcia which is in the middle of the Indian Ocean. The Indian Ocean has become increasingly important because of the tremendous amount of raw materials that exis in Africa. The U.S.S.R. knows this and it is moving there. In fact, is infiltrating all over the world. It is infiltrating into Southeast Asia which is a matter of great concern to the Red Chinese, for example.

The subject of the Panama Canal cannot be discussed without putting it in its overall global perspective because this is exactly the type of operation we are faced with.

DEFENSE ESTABLISHMENT DECLINING

As far as the response of the United States from a global viewpoint, first, of course, is a Defense Establishment of some strength and some standing. I can assure you, Mr. Chairman, that our Defense Establishment has been in a state of decline. When I was Commander in Chief of the Pacific which included Army, Navy, Air Force, and Marine Corps, just for an example, we had 900 ships. Today we have someplace in the neighborhood of 425 ships in our active fleet. The same thing has been happening as far as our Air Force and our Army are concerned.

In the Air Force we have had this continuing deterioration under which we are constrained to use the B–52 which is antiquated and over 20 years of age. We need the B–1 and we need it badly or we are not going to have the bomber capability which is so necessary.

I have not heard this mentioned except referred to this morning, but very recently there was a treaty signed between the Soviets and Panama. The criteria of this particular treaty was that the Soviet Union would construct in Panama a hydroelectric plant to provide a base for improving Panamanian economy; second, the Soviet Union has been permitted to build and open a bank in Panamanian territory; three, the Soviet Union may utilize Colon's free zone as an outlet for Soviet merchandise which includes Old France Field in the Canal Zone; and, fourth, the Soviet Union has agreed to purchase 50,000 tons of sugar from Panama on the conditions described in the pact beginning in 1978.

So the point I'm trying to emphasize and reemphasize is that the Soviet Union is moving into Panama. One of the greatest and foremost objectives that these people have is to move into Panama. You might say in one sense that the use of this canal is a secondary problem. What their real objective is is to surround the United States which this does. It takes in our southern flank.

Castro is a man of dubious character to say the least. My language in discussing this man's character is not permissible in a formal hearing of this sort. He is working hand-in-glove with Moscow.

We have a new axis. Senator. It is the Panama axis to Cuba and to Moscow. All three of these parties are lined up hand-in-glove in the future of the United States and what they want to do. You can rest assured that in the Caribbean we will see Soviet submarines. We have already seen Soviet destroyers operating in that area.

You might also be interested to know that at the time of the beginning of the actual operation on construction of the Panama Canal, foresighted individuals in the U.S. Government kept a naval presence there.

When I was executive officer of a submarine operating out of the submarine base at Coco Solo in 1936, we had six submarines that we deployed to the Caribbean on exercises. We had a special service squadron that came down from the United States and continually patrolled through that area. Of course, we had the Army Air Corps in those days. Our Air Force today has bases in Panama in the event matters became more tenuous or dangerous.

Finally, I have heard remarks made this morning about there being 16 so-called "choke points" in world trade. That is so but there are four that stand out above the others. The first one is the Strait of Gibraltar. The second one is the Suez Canal. The third one is the Strait of Molacca off of Singapore. The fourth one of course is the Panama Canal. The British have withdrawn, retired, and gone back into their own shell for reasons which are evident when you study history. Their best blood died in both World Wars I and II. It becomes understandable that we now have a situation in the United States where we do not have the British in between us and the enemy.

When the next war starts we're going to have to be ready to go. There will be no time to prepare under any circumstances.

Everything that I am saying to you, sir, and the committee, is involved with this Panama Canal which right now is the keystone of many of the points which I have made heretofore.

In my statement to this subcommittee on July 29, 1977, I stressed the strategic importance of the Panama Canal and described it as a vital element in U.S. seapower that should be retained without any dilution of sovereign control by the United States over either the canal or its absolutely necessary protective frame, the Canal Zone. To that end, I urged a six-point program for the United States as follows:

First, reaffirmation by the Congress of the sovereign rights, power, and authority of the United States in perpetuity over both the Canal Zone and canal, as provided in H.R. 82; second, major modernization of the existing canal under existing treaty provisions, as provided in H.R. 1587; three, authorization for a delegate in the Congress to represent U.S. citizens residing in the Canal Zone as provided in H.R. 1588.

To digress just a moment, Senator, I think it is very important that the U.S. citizens in the Canal Zone have a representative or delegate here in the Congress.

The very presence thereof carries great weight.

The next point, four, is the restoration of the pre-World War II, U.S. Navy's Special Service Squadron; five, stationing of a unit of U.S. submarines at Coco Solo; and, six, recovery of Old France Field and retention of the naval air station at Coco Solo.

In these connections, I wish to reemphasize the importance of the statement by the late Maj. Gen. Thomas A. Lane, a distinguished strategist with Canal Zone experience, that was quoted in my July 29 testimony. The very idea that surrender by the United States now or in the future of its sovereign control over the canal enterprise would remove the causes of friction is a calamitous misjudgment. Instead, Marxist-Leninist subversion would increase, and probably involve the United States in the use of force to retain its position.

Mr. Chairman, of all the points in the previously outlined program, that of retention of our undiluted sovereignty is the crucial one. Without sovereignty all other matters, including the neutrality arrangement, become inconsequential. We simply do not wish a Suez Canal type of crisis at Panama.

In view of all the facts involved in the complicated situation, the Senate should reject the proposed treaties; and then the way would be open for the major modernization of the existing canal for which project the United States now has full authority under the maintenance factor of existing treaties.

From my combined military experience, which includes Europe, Asia, the Pacific, the Caribbean and the United Nations, it is my conviction that U.S. interests are best served by keeping the canal and by retaining undiluted sovereignty over the U.S. Canal Zone, for reasons of defense as well as economic security.

Finally, I would like to reemphasize the importance of the June 8, 1977 letter of the four distinguished Chiefs of Naval Operations to the President that was quoted in the testimony of Admiral Moorer. Their conclusions reflect a vast background, including combat experience, and are more pertinent today than ever. Retired military officers are completely free to voice their innermost convictions. Active duty officers have an obligation to support the policies of their Commander in Chief.

I want to digress just a minute on that, Mr. Chairman, if I may.

As far as officers on active duty, they must obey the orders of the Commander in Chief. If we ever get into a position in this country, the United States, this great nation of ours, where the military circumvents or disobeys the orders of the Commander in Chief as established by the Constitution of the United States, namely, the President of the United States, we are in for real trouble in every sense of the word.

Of course, any officer on active duty always has the prerogative of resigning.

I might say to you also that there have been times when I have disagreed radically with the high command, both military and civilian, in my naval career. Sometimes it has crossed my mind whether or not I would be serving the country better by staying or resigning.

The only reason I digress into this is because of so much conversation especially in the Washington Post among other fine newspapers that I read.

Mr. Chairman, thank you for this opportunity to express my views. I welcome any questions that you may have so that I may discuss other aspects of the canal problem in greater detail.

Thank you.

Senator Allen. Thank you very much, Admiral McCain. We appreciate your fine testimony and your previous statement on July 29, 1977, as contained in the record of these hearings in part 2 on page 256. We will furnish you with a copy of that document for your files.

I think you made a very interesting point when we consider the very fine and very forceful letter written by four former Chiefs of Naval Operations taking a very strong stand against the treaty. These four former Chiefs of Naval Operations take this stand whereas we hear nothing from those on active duty. I think you have given an explanation for that. A contrary position would not be viewed with favor by the Commander in Chief.

To me it is significant that as soon as these Chiefs of Naval Operations have been released from these inhibitions that they do take this very strong stand—Admiral Carney, Admiral Moorer, Admiral Burke, and Admiral Anderson are each strongly opposed to these treaties.

We very much admire your own distinguished record in the U.S. Navy and we note that you also see the danger and are willing to point it out to this committee and to the Senate and to the Congress and the country.

I would comment that unity of command is a key principle of military organization recognized by all soldiers and seamen. I am wondering if you foresee any problems in providing an adequate defense for the Panama Canal under the proposed treaty if the defense policy for the canal is designed by a joint military board with equal membership from both the United States and Panama.

Admiral McCain. Yes, I see grave dangers in connection with an organization of that sort and the undermining thereof. It is my firm conviction both from experience and also contact with the armed forces of many foreign countries that there are very few if any that have the discipline and morale and the high degree of integrity that our own officers have.

I would suggest to you, sir, that if we were to go to an organization such as that the members of the Panamanian Armed Forces would be playing a game in some fashion which would be most difficult for us to meet.

Senator Allen. Would the Panamanians not be able to check any initiatives that our people wanted to take in defense of the canal?

Admiral McCain. Yes, but the big point about it is this: If it is established on the basis of a body comprised of officers from Panamanian Armed Forces and officers from our own Armed Forces, and let's say they vote on a particular proposition, and it is to the disadvantage of the United States, the Panamanian Government, under the circumstances existing, from my viewpoint and the fact that it is Marxist oriented, would go against the United States to implement whatever that might be even though those U.S. officers have informed Washington, D.C., of the exact details thereof.

I do not trust these people at all, Mr. Chairman.

Senator Allen. Is there a danger that the canal would in the first instance be taken over by Panama or in another instance that it would fall into the hands of Communists either in Cuba or in Russia?

Admiral McCain. Yes, sir. There is grave danger of it.

I think that the very point that I made before about the axis from Moscow to Cuba to Panama would give the impetus and the encouragement for such to happen.

One thing I did not mention, Mr. Chairman—I'm delighted that you brought this up—among other things Soviet Russia is building a large navy. This navy is the means by which she is going to get around the world. This is why we are going to see Soviet naval ships in the Caribbean and we're also going to see them off the Atlantic and Pacific coastlines.

Senator Allen. One of the portions of the tremendous amounts of money that Panama would receive under this treaty is $50 million in military aid. This supposedly is to help defend the canal. Is there not danger that this money would be used simply to prop up the military dictatorship in Panama?

Admiral McCain. Absolutely; without question or doubt. I am glad to have been at this hearing this morning because for the first time, I have heard in both forthright and strong terms the aspects of the whole problem. Believe me, Panama is going to be a cesspool into which the United States would have to put billions and billions of dollars as time goes on if we want to maintain some sort of position of rationality.

Senator Allen. One of the justifications for the treaty that has been offered has been that this treaty is necessary to prevent the Panamanians from engaging in sabotage, violence, riots, or demonstrations.

Is there any assurance that this treaty, which postpones full delivery of control over the canal to Panama for a period of 23 years, will satisfy the same perpetrators of sabotage and violence and demonstrations?

Admiral McCain. My prediction to you is that it would not in any sense of the word. The business of sabotage and terrorism that have become a part of human life worldwide will continue. But I also say to you that the Panamanian Government is not about to engage in such activities because the canal is a gold mine to her—the operation of the canal itself—she needs the operation because she needs the money because of the debt that has been talked about before.

Another point about it is that we cannot under any circumstances, Senator, allow ourselves to be governed in our decisionmaking processes by a fear that second-rate characters will use weapons to destroy whatever it may be that they have their eyes set on.

I want to speak more to that point.

In the Korean War General MacArthur was forbidden to cross the Yaloo River because of a fear of what the Red Chinese might do. You might be interested to know that we could not send soldiers beyond the borders of South Vietnam because we were afraid of what the Red Chinese might do. Now I return and I read that we are afraid to do anything positive as far as the Panama Canal is concerned because we are afraid it is going to irritate the Latin American countries.

We just cannot live that way. Human beings don't live that way among themselves.

Senator ALLEN. Isn't this going to encourage other nations to test our will to defend ourselves and our will to resist aggression and to resist unreasonable demands upon the United States all around the globe?

Admiral McCAIN. If we take a firm, forthright, and direct stand as a strong man should on this proposition in the Republic of Panama, it will discourage other nations throughout the world from doing the same. What is tragic is that we did not win the war in Vietnam as we should have. That will always be a point that will encourage some nations to continue to do so although I think that reaction is going to pass into the graveyard too.

While we are talking about this, one of the worst things we can do is take those 20,000 troops out of South Korea. I know what I'm speaking about. I was out there for 4½ years. I was in intimate contact with the leaders of all the countries and the many problems involved. What we are going through with Taiwan at the present time and the possibility of selling it down the river is also bad.

When you consider the Philippines with those two bases that I mentioned to you, I think that one of the biggest objectives on the part of Marcos, who is the President of the Philippines, is that what he really wants to get out of United States is $1 billion or more. I'm not so sure he would ever want the United States to give up those bases because he knows the future of the Philippines also depends on our presence.

Senator ALLEN. Would not it be much easier to defend the canal if we maintain an adequate military presence in Panama than if we withdraw and then have to have an amphibious landing there to protect the canal at a later date?

Admiral McCAIN. If I may be so bold and without appearing disrespectful, I could not agree with you more. If we pull out of any of these places to move back would be practically impossible. I will predict to you that going back would be very nearly impossible under these circumstances.

Senator ALLEN. Thank you very much, Admiral McCain, for your very fine testimony.

Admiral McCAIN. Thank you, sir.

Senator ALLEN. Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Admiral McCain, I am very happy to welcome you here.

You seem to be indicating that if we ratify this treaty and pull out and turn it over then we are very likely to lose access to the canal anyway within a short period of time.

Admiral McCAIN. I agree.

I do not have to tell you what happened to the British in the Suez. First, the Egyptians raised the tolls and then they closed the canal.

It so happened that in one of my many trips that I was in the Republic of South Africa. They took me out to the Cape of Good Hope. You cannot imagine the swarm of seagoing freighter ships going around the Cape of Good Hope because the canal was closed at that time. You can rest assured that we would be sending them around the horn in equal numbers in order to get them from the east to the west coast.

Senator HATCH. That is if the Communists don't start patroling that water of the Cape of Good Hope because of the policies that we are pursuing in Africa right now, specifically with respect to Rhodesia and South Africa.

Admiral MCCAIN. If I had my way over again, when I was putting in a strong recommendation which was successful—thanks to such very fine individuals as Admiral Moorer who also saw the need—when we got Diego Garcia, I wish now that I had strongly recommended the Simonstown Naval Base on the southern tip of Africa.

What the United States does not understand is that we are the leader of the free world and we have to be worldwide in our thinking and in our objectives and goals. We have to meet these obligations.

Excuse me, sir.

Senator HATCH. That's fine.

There is a lot of conversation in this administration about giving up the Diego Garcia in the Indian Ocean.

Admiral MCCAIN. I know that. But I have found out that when you retire from active duty they pull down the blinds and lock the door. Nobody will let you into the inner councils on a matter of this sort, not that I have really tried.

With Diego Garcia the importance of it strategically is that it puts us right in touch with the oil routes coming out of the Persian Gulf. It puts us into easy reach of the trade routes coming down out of the Red Sea and past Somalia in which the Russians have set up a large base. I might add also—thus the need for the Navy and the need for a B–1, which I previously mentioned.

Senator HATCH. Plus the need to maintain the worldwide integrity of the world waterways.

Admiral MCCAIN. Yes, sir.

Senator HATCH. There is a desire to normalize relations with Red China and to turn our backs on Taiwan, and to pull the ground troops out of Korea, and to normalize relations with Vietnam, Cambodia, and Laos, and to do away with Diego Garcia. Then there is the mess that we have created in the Middle East. Now there seems to be more controversy in the Middle East than has ever existed there. In Europe the Communists are out of hiding.

We are supporting Jamaica and its Marxist regime. We are normalizing relations with Cuba.

It seems to me that the last link in the international position of the United States in naval trade or maritime trade is the Panama Canal.

Admiral MCCAIN. I agree that your points have great and tremendous weight. Of course, we cannot forget some of our frontiers like Hawaii and Guam and other territories out there.

I agree with every statement you made. I think they are very pertinent and to the point.

I also wanted to add something. The United States itself for reasons that I do not know—and I have done a lot of public speaking on this subject all over the country—people applaud and then when I get off the stand they say, "Sure, there goes a military mind again."

Senator HATCH. We have had the Ambassadors going all over America and saying that the canal has diminished in value and that it's not important anymore because we don't really use it very much.

What is the effect of the Panama Canal on commercial shipping, not on the United States but on other nations as well? What will be the effect of a dramatic increase in tolls, and what effect is that going to have on other nations as well as ourselves? What is the commercial importance of the canal?

Admiral McCain. The commercial use of that canal is highly important.

Let's speak to the United States. There are something like 13,000 merchant ships that go through that canal each year. These are not all American flags by any stretch of the imagination because stupidly we have allowed our merchant marine to deteriorate, in value, as you know, and in numbers of ships. In any event, of these 13,000 to 14,000 ships that pass through this canal 70 percent of them either originate or terminate either on the east or west coast of the United States just to give you an example.

As for the other nations that use this canal, it is a lifesaver to them.

CANAL ESSENTIAL IN VIETNAM WAR

I might say to you too, just to digress a minute, that while I was in command in the Pacific during the war in Vietnam that canal was absolutely essential to us because through that canal came the logistic support for all these very fine young boys we had fighting on the beaches.

Senator Hatch. While you're at it, I have heard that we have only sent very few military ships through the canal in the last couple of years, and that therefore, it's not important militarily. Could you comment on that?

Admiral McCain. I have heard that comment. We are not now at war.

Senator Hatch. I have heard that also, all over the country. These Ambassadors are claiming that when the American people hear the truth they are going to be for the treaty. I am suggesting that this is not true.

Admiral McCain. I agree with you, sir. They do not know what they are talking about.

One reason there has been a decrease in the number of naval ships, and it has not been as radical as what these Ambassadors are telling people, is because of the tremendous dropoff in numbers of our fleet that I mentioned.

Senator Hatch. And we don't have the war in Vietnam now and there is not the need for support right now.

Admiral McCain. No, but we need a bigger fleet because the presence of a fleet does things that you can't do with any other type of instrument of warfare, that is its mere presence has an effect.

I will tell you an interesting story. When I was commander in chief of the Pacific there was a Russian cruiser and two Russian destroyers anchored south of the Island of Lanai which is southwest of Oahu where my headquarters were. They anchored there overnight and replenished. This was in international waters where they anchored incidentally. They got underway next morning and of course we were following them very closely. They went on to the northwest and later they turned up toward Vladivostok.

The point I want to make is this. The presence of just a man-of-war can have an astonishing effect without firing a gun or any other action. What amuses me in life too is that I read in all the newspapers that they are going to be able to finish off ships by planes in a very short time. I heard that when I was an ensign. It was first stated in the days of World War I when planes first came in.

I'm not against planes because my father had command of the carrier task force under Halsey in World War II when you had to have planes. It was absolutely essential to us. My son was a naval aviator in the Vietnam war. It hurt us badly in the war in Vietnam when President Johnson stopped that bombing in 1968. We finally got it reinstituted in 1972.

The point I'm trying to make is that you need all these elements but ships play and will always play a very important role and it's not understood.

Senator HATCH. Is it true also that our Navy is going to smaller and quicker, more efficient ships that will be able to utilize the canal nullifying the argument that the aircraft carriers cannot go through? This argument about our ships not being able to transit the canal really does not make much sense does it?

Admiral McCAIN. No.

Furthermore, I would hope that once the problem is settled on the Panama Canal itself and the United States retains sovereign rights thereof that there will be a modernization of that canal so that would take care of all situations.

SUPERTANKER ARGUMENT A SHAM

One of the other points, Senator, is this. It is the supertankers. One of the big points of these treaty proponents is that the supertankers will not go through there. Supertankers can't even go into our harbors. The supertankers anchor out. They pump oil ashore either through barges or through oil lines that go out to the tankers. It was never intended that these big tankers go through the canal.

Senator HATCH. What you seem to be saying is that during the Korea and Vietnam wars that canal had tremendous use.

Admiral McCAIN. It did, sir.

Senator HATCH. Militarily?

Admiral McCAIN. Right.

Senator HATCH. It has always had tremendous use commercially, in war and peace, and it is still a very viable 14,000-ships-a-year canal?

Admiral McCAIN. Yes, sir.

Senator HATCH. Without it this country will be seriously hurt commercially and militarily.

Admiral McCAIN. Absolutely.

Senator HATCH. If we are going to depend upon the Middle East for transportation of oil which has to go around to Cape of Good Hope to come to our eastern and gulf refineries, if that lane—to use Governor Reagan's term—is "chocked off" by the Russian Navy, then how are we going to get our oil to the west coast unless we have the Panama Canal?

Admiral McCain. In one sense it's easy to say that we can't do it. In the first place I do not think that Russia, despite the number of ships that she is building, that they are good sailors. I do not think they know how to go to sea yet. They got licked in the Tsushima Straits in 1905 by the Japanese. I do not believe that Russia itself—the Soviet Union, they told me not to say Russia I might add—the Soviet Union itself has not arrived at the technological advanced state that they have such as the kind of light we have overhead here and the switches that turn it on and other operations. They are backward.

I do think, however, that they are trying to make up in numbers of planes and tanks and soldiers and ships what they lack in technological capability.

But believe me we need that canal and we need it badly. Furthermore, the war in Vietnam was bad enough as it was but it would have been horrendous if we had not been able to bring our supply ships through that canal and on out through the Pacific.

Senator Hatch. A few U.S. warships were not able to use the canal. What would be the effect on the U.S. Navy regarding increased cost to maintain a two-ocean fleet, and the ability of the U.S. Navy to move expeditiously to Africa in the event of military involvement or to other areas?

Admiral McCain. It would have a deleterious effect, Senator, if that were to happen. On the other hand, I want to say to you that the United States is ultimately going to have to build a bigger Navy. We're going to have to have a two-ocean Navy. Ships cannot be in both places at once because of the Indian Ocean prospect that is coming up.

As you know, we have always kept a fleet in the Mediterranean.

Incidentally, about the Mediterranean, I have had command of two different ships over there and at no time did I run into a Russian ship. You talk to some of these young captains of these cruisers now—I never though I would call a captain of a cruiser young—they will tell you that when they go into the Mediterranean they never fail to run into a Russian ship. The Russians keep some place in the neighborhood of 60 ships in the Mediterranean Sea. They have a fleet of about 20 in the Indian Ocean.

We're living in a tough, hard, competitive world. Of all the nations that should be standing up, the United States is it by virtue of its background, its history, and its individuals in the lead—like it or not.

When I was commander in chief of the Pacific I used to go out to the Far East once a month, particularly to Vietnam. I used to sit down in the DMZ and fire-support bases and talk to the soldiers just like I'm talking to you right now. Of course these young American boys are the finest in the world. I was sitting there one day talking to about 40 of them when a sergeant produced a bunch of papers which had been dropped on our lines by balloons from up in North Vietnam which were quotes from certain characters back in Washington and how they were deriding the war and the policies of the United States.

He said to me, "Admiral, what do you think of that?" Every soldier was really looking at me. I said, "Sergeant, you know the only reason we're out here is to make sure that the United States is so secure that such damn fools can make such statements in security back home."

Senator HATCH. I couldn't agree with you more.

It's amazing to me how many retired Army and Navy officers and people who have had intimate contact with the canal and who have cut the orders to use it and who know how it works are all totally opposed to these treaties.

I support you after looking at almost every aspect of the treaties. It is good to see military leaders like you who are willing to come in and tell us the truth of these matters.

Admiral McCAIN. I am privileged and honored to be here as I said before, Senator. I was a congressional liaison officer for 3 years. One of the finest associations I have ever had in my life has been with Senators like yourself and the Chairman and others that were here at that time starting with Senator Dirksen. the Chairman of the Armed Services Committee, Senator Russell. and Senator Stennis and others.

I think this country is going to do well because of distinguished statesmen like yourself.

Senator HATCH. I hope you're right. Thank you. sir.

Senator ALLEN. Thank you very much, Admiral McCain. We appreciate your fine testimony and your cooperation with the committee.

Admiral McCAIN. Thank you, Senator. I appreciate it very much.

Senator ALLEN. I insert for the record a statement of Maj. Gen. J. Milnor Roberts. USAR retired, executive director, Reserve Officers Association of the United States in opposition to the treaty.

[Material follows:]

Reserve Officers Association of the United States

Major General J. MILNOR ROBERTS, USAR, *Executive Director*

Colonel FLOYD H. HAYWOOD, JR., USAF (Ret.), *Deputy Executive Director*
Colonel ROBERT L. MOORE, USA (Ret.), *Director, Army Affairs*
Rear Admiral JOHN B. JOHNSON, USNR (Ret.), *Director, Navy, Marine Corps, and Coast Guard Affairs*
Colonel BENJAMIN S. CATLIN III, USAF (Ret.), *Director, Air Force Affairs*
Colonel A. H. HUMPHREYS, USAR, *Director, Retirement Affairs*
Colonel THEODORE N. GANAS, USAR, *Director, Membership Affairs*
Captain WILLIAM G. BARNSON, USAFR, *Legislative Assistant*
National Headquarters—MINUTE MAN MEMORIAL BUILDING, 1 CONSTITUTION AVENUE, N.E., WASHINGTON, D.C. 20002, 202/547-4300

STATEMENT OF

MAJOR GENERAL J. MILNOR ROBERTS, USAR RET.

EXECUTIVE DIRECTOR

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

BEFORE THE

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON SEPARATION OF POWERS

PANAMA CANAL TREATY

8 SEPTEMBER 1977

STATEMENT OF MAJOR GENERAL J. MILNOR ROBERTS, USAR-RET., EXECUTIVE DIRECTOR, RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES, BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY CONCERNING THE PANAMA CANAL TREATY 8 SEPT. 1977.

Mr. Chairman and Members of the Committee:

I wish to thank you for the opportunity to testify before your committee and in such distinguished company. I am Major General J. Milnor Roberts, Army Reserve Retired, Executive Director of the Reserve Officers Association of the United States. The Reserve Officers Association is a professional association of officers of all the armed services, regular and reserve, but primarily consisting of citizens who dedicate extra time and effort to the national defense over a full time civilian career in your local communities. Twice in the last four years, these reservists have expressed their opposition to any arrangement which would result in diluted control, operation, and defense of the Panama Canal and Canal Zone. We believe that this particular treaty that is before you today is appeasement in phases which can only whet the appetites of those who would disrupt the peace and freedom of the nations of the Caribbean and Central and South America; as well as disrupt the defense of the United States.

We recognize that the Panamanians are less than happy with the 1903 Treaty. It is not hard to see why. The Panama Canal cuts through their country like an Interstate Highway through your home town. It is a highly visible barrier, even though it is the major source of income. On the other hand, we built it, we paid for it three times. We paid off the French Company, the Panamanians and the Columbians. It is ours in any real sense of the word.

The question is therefore one of giving it up or sharing it. The proponents of the treaty ask, why keep the Canal? And say that there is no good reason to keep it. We would rather ask, why should we give it up? And we say, there is no good reason to give it up.

We have been told, in essence, that the Canal is not vital to our economy or our national defense, and that we cannot defend the Canal against a presumed Panamanian Viet Cong. The evidence used to substantiate these allegations is presented in a manner which classically illustrates the old propaganda trick called "card stacking." Much of the evidence is misleading, flimsy, even irrelevant. For example, for what earthly reason would a submarine officer desire to submerge his submarine while in the Canal. All warships are vulnerable while in the Canal and always have been.

In a more serious vein, it is alleged that we have a two ocean navy and therefore we do not need the Canal. It is also pointed out that very few naval ships have used the Canal in recent years and several ships such as the super carriers and super tankers are too large to use the Canal.

In response to this seductive but spurious argument, we point out that we have had a "two ocean navy" since the Canal was built and which is dependent on the Canal for wartime logistical support. Heavy bulk cargoes such as ammunition, fuel, food, and vehicles are used in prodigious amounts in a combat zone. Ninety six percent of the tonnage that went to Vietnam went by ship, over seventy percent of which went through the Panama Canal. A peacetime force uses less than one tenth of the wartime tonnage requirements, much of which is procured locally, hence the smaller number of ships.

We also point out that there have been serious discussions of making the Navy a "one-ocean Navy" because of the high cost of ships which also would be of smaller size.

The risks and costs of a 6,000 mile detour around South America in the event of the denial of the Canal to US shipping would be devastating to overseas military combat operations, particularly in the Pacific. First, the increase in mileage would cut the amount of tonnage received in a combat zone by half or require a doubling of the size of the cargo fleet. Secondly, the detour itself would increase the vulnerability of the shipping lanes to submarines, commerce raiders, land based aircraft, and missile armed fast patrol boats. This in turn would require more naval assets to be spent on sea control missions in lieu of missions related to the strategic projection of national power.

The fact that many of the super tankers and super carriers cannot use the Canal is more a liability of the ship than of the Canal. We would also point out that a super tanker of 100,000 tons is both a lucrative and vulnerable target for military action.

In addition to the naval and shipping aspects of the Panama Canal, the Canal Zone also features the only major US airbases for ready access to Central and South America. These facilities are significant not only for the defense of the canal, but for the defense needs of the Southern Hemisphere. We may have need for the Panama Zone air facilities that are related to problems in areas outside Panama. At the same time, we may lose the fields themselves or have restrictions on their use resulting from renegotiations of our military presence in the former Zone such as has happened in Italy, Libya, and Spain.

On the economic side, we find it hard to believe that the Canal is not vital to the national economy at the very time that Alaskan oil is being shipped to a fuel hungry Northeast. We should also note that as much as three quarters of the shipping of some of the Central and South American nations goes through the Canal.

We believe that there can be no doubt that the Canal is vital to both our national economy and particularly our national defense. The administration has used the Joint Chiefs of Staff to present evidence of the Canal's non essentiality and indefensibility. What you hear from the Joint Chiefs is what the administration wants you to hear and should be viewed as evidence of the discipline and obedience of the Joint Chiefs to their civilian bosses.

The Joint Chiefs tell us that it will take 100,000 US troops, the equivalent of an Army Corps with supporting Naval and Air Forces, to defend the Canal against a determined guerilla threat. The annual costs of an Army combat division in a Vietnam style war is approximately one billion dollars; therefore the costs of defending the Canal, according to the JCS estimate, is approximately two or three billion dollars a year.

We must also examine the nature of the internal threat to the Canal. By internal we mean, from Panama by largely Panamanian forces. It must be conceded that many of the key ingredients of another Vietnam are there. The high school students form a vocal, articulate, and influential nucleus with widespread popular support. There are outside groups who would be more than happy to fund, train, and equip Panamanian guerilla forces. There is a visible symbol of what some consider "colonialism," the Canal itself.

One major ingredient is missing, however. It clearly is not in the Panamanian national interest to destroy the Canal. Forty percent of the national income comes from the Canal. Destruction of the Canal would be an unparalleled disaster to the Panamanian economy outrivaling crop failure, drought, or a drop in the price of bananas.

A more likely threat to the Canal by Panamanians is a threat of selective interdiction or blockade of American shipping by a threat to the ships in the Canal. This threat can be accomplished by relatively conventional landbased forces using short range combat weapons including tanks, anti-tank systems, light artillery, and small arms. The size and shape of the zone as a buffer around the Canal prevents this type of action short of actual invasion of the zone itself.

Selective interdiction may also be accomplished by guerilla forces equipped with anti-tank weapons and special demolitions. This military capability will exist regardless of who runs the Canal and must be regarded as a constant threat to guard against. We must take into consideration the fact that as long as Old Glory flies over the Canal in any capacity, there will be those in and out of Panama who will desire to use the threat of closing the Canal to achieve political leverage over the US.

It is against this latter threat that the friendliness of Panama is extremely important. On the other hand, placing Panamanian military forces in close proximity as a matter of treaty right, increases the capability of Canal interdiction by unfriendly Panamanian interest. World public opinion might cause us to hesitate to move against Panamanian troops blockading the Canal, if those troops were there by treaty right.

The Canal Zone, as a military buffer area, is affected the most by the treaty. If the Zone is abolished, most of the military installations and Canal facilities under the control of the US or the US Canal Corporation until the year 2000 will be left in an exposed position. We note that the Canal Zone is unique in the sense that not only is it US territory, an agency of the US Government holds the title to the land. This is clearly illustrated by the fact that no one may own his own home in the Zone. All those who live in the Zone live in government owned housing and are either Panama Canal Company employees or US military personnel and their dependents.

Much has been said about the Americans who live in the Zone. Proponents of the treaty say that these citizens have caused considerable unrest by their so-called colonial priveleges of low cost stores, housing, etc. Some opponents of the treaty imply that these citizens will be abandoned to some horrible fate at the hands of the Panamanians. We believe that the status of those who live and work in the Zone will not change substantially as they will be covered in a Status of Forces Agreement (SOFA) like American military and civilian government employees are in places all over the world.

We are also concerned over the financial arrangements of the treaty. We note that some $50-70 million will be paid to Panama from the proceeds from the Canal. This increase is allegedly to come from an increase in tolls of thirty cents a ton. With ships weighing many thousands of Canal tons, the increase in tolls is expected to be substantial. An upper limit on Canal tolls is placed in the fact that the tolls must be less than the costof a trip around the Horn. Since the Canal runs at a $7 million deficit, we ask whether the American taxpayer is going to pay directly into the coffers of the new US Government Corporation that replaces the Canal Company? If such is to be the case, we have a case of a direct payment to Panama using the treasury of the Canal Corporation as a laundry or conduit.

We should also examine the inflationary impact of increased Canal tolls on our own economy, which needs no inflationary pressures, and those of our neighbors to the South who need inflation even less.

In summary, we find no good reason to give up the Canal and its Zone, and the pro-treaty arguments are unsound, fallacious or frivolous. Finally, we wish to point out that this treaty appears to be a form of appeasement in phases. It appears to be appeasement to a conjured threat of a Panamanian Viet Cong; a threat which is more spectre than substance. We know, and the world knows, that appeasement, even the appearance of appeasement is too tempting a morsel to the hungry hounds of war. It is also particularly humiliating to the American public to appease anyone so soon after our misfortunes in Vietnam and Angola.

We caution the Senate to examine carefully the exact wording of this treaty and the subtle nuances of the words used therein that describe our rights to keep the Canal open, accessible, efficient, and under our control.

Senator ALLEN. We are now going to recess subject to further call by the Chair. We are going to hold additional hearings. We feel that the committee is an appropriate forum for the expression of views by leading citizens of our country for or against the treaty and on both sides of the constitutional issues.

We invite any representatives of the country to make arrangements with the staff for possible appearance before the committee to express views for or against the treaty, for or against the proposition that the entire Congress, in addition to action by the Senate on the treaty, take action with respect to the disposition of the property of the United States in the Isthmus of Panama.

The administration has suggested that an educational campaign will be undertaken to sell the idea of the treaty to the American people. We feel that this subcommittee, as I have stated, is an appropriate forum for this educational effort. We do not know when the treaty is going to be presented to the floor of the Senate or when it will be acted on or when hearings will be held by appropriate committees.

I understand the Committee on Armed Services has set hearings on the military aspects of the treaty. I am sure that the Committee on Foreign Relations at an early date will also set hearings.

We believe that we cannot have too many forums for the expression of views by citizens on this important issue. So we do welcome expression of views on both sides of all of these important questions.

Senator HATCH. Mr. Chairman, I certainly agree with you, especially on these constitutional issues. We have actually offered a challenge to anybody who can refute these constitutional points. We would like to hear from you. It is a matter of great importance.

Also I second your statement, Mr. Chairman, that we would like to hear people on both sides of every one of these issues because it is going to help everybody concerned if we do.

I have one other observation, Mr. Chairman. I am hoping that Mr. Solomon of the Treasury Department, who did not show up, will again be asked to appear before this subcommittee. Apparently we have not been able to get him. I think his testimony is crucial.

Senator ALLEN. Very well. At such time as we have a quorum of the subcommittee present, this matter will be considered further. But in the meantime we will ask the staff to make a stronger effort to obtain the presence of this witness from the Treasury Department.

Senator HATCH. I appreciate that and I think we should look into that.

In the interest of presenting both sides of this issue I would ask unanimous consent that the August 15, 1977, Department of State factsheet containing the basic elements of the Panama Canal Treaty be incorporated in the record at this time, and that the proposed treaties be incorporated into the record at this time as well as the miriad accompanying documents.

I also ask unanimous consent that a memorandum prepared by my office to the Senate Steering Committee concerning misrepresentations by the administration as to the Panama Canal be inserted into the record at this time.

Senator ALLEN. Without objection, these insertions in the record will be made.

Senator HATCH. Thank you, Mr. Chairman.

Senator ALLEN. Thank you.

The subcommittee will stand in recess subject to the call of the Chair. We will probably have another meeting within a week or 10 days.

[Whereupon, at 2:55 p.m., the meeting was recessed.]

[Aforementioned material was subsequently supplied for the record:]

August 15, 1977

Department of State

FACT SHEET

Basic Elements of the Agreement in Principle on the New Panama Canal Treaties

Defense and National Security.

-- The United States will have primary responsibility for the Canal's defense during the basic Treaty's term (until the year 2000). Panama will participate, and at the treaty's end our military presence will cease.

-- A Status of Forces Agreement similar to such agreements elsewhere will cover the activities and presence of our military forces.

-- The United States will continue to have access to and the rights to use all land and water areas and installations necessary for the defense of the Canal during the basic treaty period.

-- In a separate treaty Panama and the United States will maintain indefinitely a regime providing for the permanent neutrality of the Canal including non-discriminatory access and tolls for merchant and naval vessels of all nations.

-- United States and Panamanian warships will be entitled to expeditious passage of the Canal at all times without regard to the type of propulsion or cargo carried.

-- Our continuing freedom of action to maintain the Canal's neutrality will not be limited by the Treaty.

Canal Operations.

-- The United States will have responsibility for Canal operations during the period of the basic Treaty.

-- It will continue to have access to and the rights to use all land and water areas and facilities necessary for the operation and maintenance of the Canal during the basic Treaty period.

-- It will act through a United States Government agency which will replace the Panama Canal Company. A policy level board of five Americans and four Panamanians will serve as the Board of Directors. Until 1990, the Canal Administrator will be an American and the Deputy Administrator a Panamanian. Thereafter, the Administrator will be Panamanian and the Deputy, American. Panamanian board members and the Panamanian Deputy Administrator/Administrator will be proposed by Panama and appointed by the United States. Panamanians will participate increasingly in the Canal's operation at all levels.

Economic Factors.

The treaty's financial provisions involve no congressional appropriations. Instead, during the treaty's life Panama will receive exclusively from canal revenues:

-- an annual payment from toll revenues of 30 cents (to be adjusted periodically for inflation) per Panama Canal ton transiting the Canal.

-- a fixed sum of ten million dollars per annum and an additional 10 million per year if canal traffic and revenues permit.

In addition the United States will cooperate with Panama outside the treaty to promote Panama's development and stability. To this end, the United States has pledged its best efforts to arrange for an economic program of loans, loan guarantees and credits which would be implemented over the next several years under existing statutory programs. This economic cooperation program would use up to $200 million in Export-Import Bank credits, up to $75 million in AID housing guarantees, and $20 million in Overseas Private Investment Corporation (OPIC) loan guarantees.

Panama will also receive up to $50 million in foreign military sales credits over a period of ten years,under existing statutory programs, to improve Panama's ability to assist in the Canal's defense.

No major increase is contemplated in AID loans and grants.

Private businesses and non-profit activities in the present Canal Zone will be able to continue their operations on the same terms applicable elsewhere in Panama.

A joint authority will coordinate port and railroad activities.

Employees.

All U.S. civilians currently employed in the Canal Zone can continue in United States Government jobs until retirement. Present employees of the Canal Company and Canal Zone Government may continue to work for the new agency until their retirement or until the termination of their employment for any other reason. The number of present U.S. citizen employees of the Company will be reduced 20 percent during the first five years of the Treaty. All U.S. citizen employees will enjoy rights and protections similar to those of United States Government employees elsewhere abroad. Present U.S. citizen employees will have access to military postal, PX and commissary facilities for the first five years of the Treaty. New United States citizen employees will generally be rotated every five years.

Terms and conditions of employment will generally be no less favorable to persons already employed than those in force immediately prior to the start of the Treaty. Hiring policy will provide preferences for Panamanian applicants. With regard to basic wages there shall be no discrimination on the basis of nationality, sex or race. The United States will provide an appropriate early retirement program. Persons employed in activities transferred to Panama will to the maximum extent possible be retained by Panama. Panama and the United States will cooperate in providing appropriate health and retirement programs.

Panama will assume general territorial jurisdiction over the present Canal Zone at the Treaty's start. United States criminal jurisdiction over its nationals will be phased down during the first three years of the Treaty. Thereafter, Panama will exercise primary criminal jurisdiction with the understanding that it may waive jurisdiction to the United States. United States citizen employees and their dependents charged with crimes will be entitled to procedural guarantees and will be permitted to serve any sentences in the United States in accordance with a reciprocal arrangement.

New Sea-level Canal.

Panama and the United States commit themselves jointly to study the feasibility of a sea-level canal and, if they agree that such canal is necessary, to negotiate mutually agreeable terms for its construction. In addition the United States will have the right throughout the term of the basic treaty to add a third lane of locks to increase the capacity of the existing canal.

Treaties.

There will be two treaties: (1) a treaty guaranteeing the permanent neutrality of the canal, and (2) a basic treaty governing the operation and defense of the canal which will extend through December 31, 1999. The basic treaty will be supported by separate agreements in implementation of its provisions concerning defense and operation of the canal.

BACKGROUND INFORMATION

Purpose of the Treaties. The new treaties on the Panama Canal will provide an entirely new basis for cooperation between the United States and Panama in the operation and defense of the Panama Canal. They will replace the U.S.-Panama Treaty of 1903, which has governed Canal operations since the waterway's construction, and subsequent amendments.

The Existing System. Under the 1903 Treaty, the U.S. has total control of Canal operations. The U.S. also administers the Canal Zone -- an area of Panamanian territory five miles wide on either side of the Canal. In this area Panama has sovereignty while we have "as-if-sovereign" rights permanently. This arrangement is deeply resented in Panama and a liability in our relations with Latin America and with many other nations of the world.

Basic U.S. Objectives. In negotiating a new treaty, the United States has proceeded on the basis that its national interest lies in assuring that the Canal continues to be efficiently operated, secure, neutral, and open to all nations on a non-discriminatory basis. Fundamental to this objective is the cooperation of Panama.

History of the Negotiations

The negotiations, extending over thirteen years, have been pursued by four Administrations of both Parties. They began in 1964, following a serious crisis in U.S.-Panamanian relations created by rioting along the Canal Zone boundary in which 20 Panamanians and 4 Americans were killed. In December 1964, President Johnson, after consulting with Presidents Eisenhower and Truman, announced that the U.S. would begin talks with Panama on an entirely new Canal Treaty. These negotiations resulted in draft treaties that were not acted on by either country. The present series of negotiations began in 1973 with the appointment of Ambassador Bunker as Chief Negotiator by President Nixon and continued during the Ford Administration. President Carter decided to continue the negotiations after taking office in January 1977 and appointed Ambassador Sol Linowitz to serve as Co-Negotiator with Ambassador Bunker. The Department of Defense has been an active participant in the negotiations and has been represented by Lt. General Welborn G. Dolvin.

Data on the Panama Canal

-- Description. The Canal is 51 miles long. It is a lock canal, operating by gravity flow of water from specially constructed reservoirs.

-- Cost. It is extremely difficult to provide a single figure for the cost of the Canal. The construction cost to the United States at the time of completion of the Canal in 1914 was $387 million. The amount of unrecovered U.S. investment in the Canal is $752 million. The current book value of the Canal and related facilities is $561.5 million.

-- Work Force. The Canal enterprise employs 13,139 persons, of whom 27 percent are U.S. citizens. Almost all of the others are Panamanians.

-- Defense. The United States maintains seven military base areas in the Canal Zone. Total United States military personnel are 9300.

-- Financial Condition. Since 1951 the Canal has been required by law to meet its own operating costs. Until 1973 it did so. It has shown a net operating loss each year since 1973, with the result that tolls have been raised -- the first toll increases since the Canal was opened.

-- Importance to U.S. Trade. Of all the foreign trade going in and out of U.S. seaports, 7.0 percent passed through the Panama Canal in 1976. This compares with 13 percent in 1949.

SOME QUESTIONS AND ANSWERS OF CONCERN

Q. In the event of an overthrow of Torrijos by a Communist regime, what is our assurance that our access to the Canal would be uninterrupted?

A. First of all, this is not likely because the Communist Party in Panama is extremely small. It has no popular base, and there is strong opposition among the public and in the National Guard.

Secondly, under the Neutrality Treaty, we are free to take whatever action we feel is necessary to guarantee our right of transit through the Canal.

And third, regardless of what kind of government Panama has, it would not jeopardize the Canal's efficient operation by preventing us access because the waterway is vital to Panama. Even now, before ratification of the treaties, Panama derives approximately 12 percent of its gross domestic product and 18 percent of its export earnings from Canal-related activities. By permitting Panama to share in the revenues derived from tolls, the new treaties will give Panama an important stake in the efficient operation of the Canal.

Q. What is to prevent a Panamanian regime one day from simply nationalizing the canal and demanding our immediate withdrawal?

A. We will retain military bases and troops to defend the Canal until the year 2000. If this military presence by the U.S. has prevented Panamanian governments from nationalizing the Canal in the past, it certainly should be effective in the future. The Panamanians never tried to nationalize the Canal by abrogating the Treaty of 1903, which they bitterly resented. Why would they try to do it with a treaty that they negotiated freely and which they consider equitable?

After the year 2000, the Panamanians will be responsible for operating the Canal, and nationalization will no longer be relevant. Our interests in maintaining an open Canal will be preserved.

Q. In the event that the U.S. is drawn into a war with another country that Panama considers an ally, would the new treaty give us the right to keep that country from using the Canal?

A. No. The U.S. has never had the right to exclude the shipping of other countries even when we were at war with them. Even German and Japanese ships were technically permitted to use the Canal during World War II, though they did not use that right. As has been the case previously, the new treaty will guarantee a Canal, which will be open to all merchant and war vessels of all countries at all times without discrimination.

Q: What about political instability?

A: Political instability in Panama is not likely to threaten the Canal if the agreements governing its operation and defense are in the true best interests of both our countries. A more likely threat is unrest caused by dissatisfaction with the old treaty, which Panamanians of all political persuasions feel is one-sided.

Q. Will the loss of control over the Canal by the U.S. create a power vacuum in the Caribbean which Fidel Castro and his patron, the Soviet Union, will seek to exploit? Will acceptance of the treaties be viewed as a decision on the part of the U.S. to retreat from our global responsibilities?

A. The U.S. will retain primary responsibility for operating and defending the Canal until the year 2000, and we do not anticipate the the power relationships in the Caribbean will be adversely affected because of the treaties. Indeed, we believe that the new treaties, which show that we are willing to work with the new and the small countries of the Caribbean on the basis of mutual respect and cooperation, will increase our influence and prestige here and throughout the world. These countries view the U.S. ratification of the new treaties as a sign of whether we really intend to order oure relations with all states on the basis of equality and respect for their independence. If we do not ratify the treaties, our adversaries will exploit this, and we will be put on the defensive, with our prestige and influence in the Caribbean and throughout the world seriously harmed.

: What is wrong with the Treaty we currently have with Panama concerning the Canal?

: The problem with the current Canal Treaty which was negotiated in 1903 is that the Panamanians bitterly resent it. They resent the fact that it gives control to the United States of an approximately 600-square-mile area that cuts right through the middle of their country. One Panamanian official in 1970 called the 1903 Treaty "abhorrent" and "illegal", saying "the existence within our own territory of a structure and form of government totally foreign to the central national government" was the root of all conflict between Panama and the United States.

The demand for a new treaty has become a rallying point for all Latin American nations. Our failure to recognize and act to relieve this tension could jeopardize our relations with all of Latin America.

To operate the Canal efficiently and safely requires the cooperation and support of the country in which the Canal is located -- Panama. We cannot retain that cooperation if we insist on maintaining the present Treaty.

Q: Still, the present treaty has worked pretty well so far, hasn't it?

A: Four Presidents of both political parties haven't thought so. Negotiations on a new treaty have been going on for 13 years, following several outbreaks of violence in Panama. The old treaty is viewed throughout Latin America and much of the Third World, rightly or wrongly, as a vestige of colonialism. It is a sore point in our relations with every nation of Latin America. Retention of the 1903 treaty could, one day, threaten the security of the Canal.

Q: But we own the Canal and the Zone around it; it's rightfully ours. Why should we give an inch?

A: There is a good deal of misunderstanding on the point of "ownership." When we talk about owning Louisiana or Alaska or Hawaii, what we mean is that the United States has sovereignty over those territories. And it is quite clear that we do not have sovereignty over the Zone in which the Panama Canal is located. What we have are Treaty rights as if we were the sovereign, to use the terminology of the 1903 Treaty. If the intent had been to give us sovereignty, there would have been no need to write the Treaty in this way. From the very beginning we have recognized that what we have are Treaty rights, for which we pay Panama an annual amount -- rather like a rental payment. Our Treaty rights allow us to govern the Zone and to apply our law there -- to run the police, the fire department, the schools, and the courts -- but they don't make the Zone our sovereign territory in the sense that Alaska is. We have, in fact never claimed to have sovereignty. And we have made distinctions between the Canal Zone and sovereign territories like Alaska. For example, a child born to non-American parents in the Zone is not an American citizen. And shipments coming from the Zone to the United States must pass through customs and be subject to duty just as though coming from a foreign country.

Q: Why, if the Panamanian Government is now so dissatisfied with the Treaty did the Panamanians sign it in the first place in 1903?

A: There were some peculiar events surrounding the signing of the Treaty which are not widely known.

When Treaty negotiations for construction of a Canal began in 1902, Panama was part of Colombia. The United States first negotiated a Treaty for construction and control of the Canal with Colombia. But the Treaty was rejected by the Colombian Senate.

Three weeks after Colombia rejected the Treaty, in November of 1903, a revolt occurred in Panama. The revolt took place with the collaboration and support of individuals representing the former French Canal company, which hoped to sell its rights and propertyto the United States after the United States acquired the right to build the Canal. The United States immediately recognized the new nation of Panama and within a month negotiated a Treaty for the Canal. Representing Panama was a French citizen official of the French Canal company. He signed the Treaty one day before additional Panamanian negotiators arrived in Washington. The Panamanians were dismayed but nevertheless eventually approved the Treaty. An important factor in their acceptance was their belief that they were dependent on United States protection to prevent a possible Colombian reassumption of control over Panama.

These circumstances explain Latin American skepticism about the 1903 Treaty.

Q: Ethical questions aside for the moment, isn't it necessary for us to maintain total control of the Canal since it is vital to our economic well-being?

A: First of all, there is no question that the U. S. wants and needs to retain a ready access to and passage through the Canal. And President Carter would never have allowed a new Treaty arrangement to be negotiated without a guarantee of continued free access to the Canal by the United States.

But in economic terms, America's dependence on the Panama Canal has been steadily declining, due both to advances in other modes of transportation as well as to the fact that the Canal is not large enough for our new, larger cargo ships. Today only 8% of our waterborne trade goes through the Canal.

Because of the limitations on the capacity of the present Canal, we have an interest in keeping open the option of replacing the present Canal with a new sea-level Canal. Extensive studies completed in 1970 showed that the best route for such a Canal would be in Panama. Clearly, retaining the sea-level option requires that we enjoy a relationship of cooperation and mutual respect with Panama. And the prerequisite for that is a resolution of the differences that currently exist concerning the present Canal.

Q: After the year 2000, what will keep the Panamanians from raising tolls to an unbearable level?

A: The marketplace. Panama's goal will be to maximize its revenues from tolls, and if it raises tolls too high, it will drive away its business. There are many other alternatives to the Panama Canal, including the shipping of cargo by container via railroad"land-bridge" from the West to the Gulf Coasts.

Q: Why should we pay Panama good tax dollars to take over a Canal we built?

A: The financial package in the treaty calls for Panama to receive 30 cents per Panama Canal ton from tolls, plus another $10 million a year from Canal revenues -- and as much as another $10 million a year, if revenues warrant it. None of this is US tax dollars

In addition, the United States will do its best to set up a $295 million program of loans, loan guarantees and credits for Panama, which will be paid back. Moreover, most of these loans and credits will really be made to promote US trade and investment with Panama. But it is in our self-interest to promote the development of Panama to help it become a more equal partner in the operation of the Canal.

Q: What about the security question? Isn't it necessary for the U. S. to maintain control over the Canal in order to protect it from attack?

A: According to our Department of Defense, the Panama Canal is very difficult to defend, even with the most sophisticated weaponry. In fact, our military experts tell us that there is no foolproof defense against sabotage or guerrilla action aimed at the Canal. They believe that the defense of the Canal would be greatly enhanced through a new Treaty that would assure a cooperative relationship with Panama.

Given the Canal's vulnerability and the growing hostility of the Panamanians and other Latins, we are, if we insist on rigid maintenance of the status quo, playing Russian roulette with the Canal's security. Our best hope for safeguarding the Canal is to calm the tensions that exist. And the way to ease those tensions is to negotiate a new Treaty that takes into account Panama's legitimate aspirations and the desire of all Panamanians for self-respect and dignity within their own territorial boundaries.

Q. Will the Russians be able to build the new sea-level canal in Panama under the new treaties?

A. No. Under the provisions of the new treaty, the United States and Panama will jointly undertake a feasibility study on a sea-level canal. If such a study finds that a sea-level canal is necessary, then the U.S. and Panama will negotiate mutually acceptable terms for the construction, operation and defense of that canal. Panama agrees in the treaty that such a canal will not be built without the consent of the U.S., in exchange for our agreement not to build such a canal in any other country in the Western Hemisphere. By that provision, we gain a lot -- by being able to prevent alien or potentially hostile influences from building a new canal -- and we have lost very little, since extensive studies indicate that the best routes for connecting the Atlantic and Pacific are in Panama. (In the last decade, there have been many studies of as many as 30 different routes through Colombia and Central America, and those outside of Panama have been shown to be either much too expensive or too difficult to build for geological reasons.)

PANAMA CANAL TREATY

TREATY CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama,

Acting in the spirit of the Joint Declaration of April 3, 1964, by the Representatives of the Governments of the United States of America and the Republic of Panama, and of the Joint Statement of Principles of February 7, 1974, initialed by the Secretary of State of the United States of America and the Foreign Minister of the Republic of Panama, and

Acknowledging the Republic of Panama's sovereignty over its territory,

Have decided to terminate the prior Treaties pertaining to the Panama Canal and to conclude a new Treaty to serve as the basis for a new relationship between them and, accordingly, have agreed upon the following:

ARTICLE I

Abrogation of Prior Treaties and Establishment of a New Relationship

1. Upon its entry into force, this Treaty terminates and supersedes:

(a) The Isthmian Canal Convention between the United States of America and the Republic of Panama, signed at Washington, November 18, 1903;

(b) The Treaty of Friendship and Cooperation signed at Washington, March 2, 1936, and the Treaty of Mutual Understanding and Cooperation and the related Memorandum of Understandings Reached, signed at Panama, January 25, 1955, between the United States of America and the Republic of Panama;

(c) All other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama, concerning the Panama Canal which were in force prior to the entry into force of this Treaty; and

(d) Provisions concerning the Panama Canal which appear in other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama which were in force prior to the entry into force of this Treaty.

2. In accordance with the terms of this Treaty and related agreements, the Republic of Panama, as territorial sovereign, grants to the United States of America, for the duration of this Treaty, the rights

necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal. The Republic of Panama guarantees to the United States of America the peaceful use of the land and water areas which it has been granted the rights to use for such purposes pursuant to this Treaty and related agreements.

3. The Republic of Panama shall participate increasingly in the management and protection and defense of the Canal, as provided in this Treaty.

4. In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal.

ARTICLE II

Ratification, Entry into Force, and Termination

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, six calendar months

from the date of the exchange of the instruments of ratification.

2. This Treaty shall terminate at noon, Panama time, December 31, 1999.

ARTICLE III

Canal Operation and Management

1. The Republic of Panama, as territorial sovereign, grants to the United States of America the rights to manage, operate, and maintain the Panama Canal, its complementary works, installations and equipment and to provide for the orderly transit of vessels through the Panama Canal. The United States of America accepts the grant of such rights and undertakes to exercise them in accordance with this Treaty and related agreements.

2. In carrying out the foregoing responsibilities, the United States of America may:

(a) Use for the aforementioned purposes, without cost except as provided in this Treaty, the various installations and areas (including the Panama Canal) and waters, described in the Agreement in Implementation of this Article, signed this date, as well as such other areas and installations as are made available to the United States of America under this Treaty and related agreements, and take the measures necessary to ensure sanitation of such areas;

(b) Make such improvements and alterations to the aforesaid installations and areas as it deems appropriate, consistent with the terms of this Treaty;

(c) Make and enforce all rules pertaining to the passage of vessels through the Canal and other rules with respect to navigation and maritime matters, in accordance with this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules;

(d) Establish, modify, collect and retain tolls for the use of the Panama Canal, and other charges, and establish and modify methods of their assessment;

(e) Regulate relations with employees of the United States Government;

(f) Provide supporting services to facilitate the performance of its responsibilities under this Article;

(g) Issue and enforce regulations for the effective exercise of the rights and responsibilities of the United States of America under this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules; and

(h) Exercise any other right granted under this Treaty, or otherwise agreed upon between the two Parties.

3. Pursuant to the foregoing grant of rights, the United States of America shall, in accordance with the terms of this Treaty and the provisions of United

States law, carry out its responsibilities by means of a United States Government agency called the Panama Canal Commission, which shall be constituted by and in conformity with the laws of the United States of America.

(a) The Panama Canal Commission shall be supervised by a Board composed of nine members, five of whom shall be nationals of the United States of America, and four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States of America in a timely manner.

(b) Should the Republic of Panama request the United States of America to remove a Panamanian national from membership on the Board, the United States of America shall agree to such a request. In that event, the Republic of Panama shall propose another Panamanian national for appointment by the United States of America to such position in a timely manner. In case of removal of a Panamanian member of the Board at the initiative of the United States of America, both Parties will consult in advance in order to reach agreement concerning such removal, and the Republic of Panama shall propose another Panamanian national for appointment by the United States of America in his stead.

(c) The United States of America shall employ a national of the United States of America as Administrator of the Panama Canal Commission, and a Panamanian national as Deputy Administrator, through December 31, 1989. Beginning January 1, 1990, a Panamanian national shall be employed as the Administrator and a national of the

United States of America shall occupy the position of Deputy Administrator. Such Panamanian nationals shall be proposed to the United States of America by the Republic of Panama for appointment to such positions by the United States of America.

(d) Should the United States of America remove the Panamanian national from his position as Deputy Administrator, or Administrator, the Republic of Panama shall propose another Panamanian national for appointment to such position by the United States of America.

4. An illustrative description of the activities the Panama Canal Commission will perform in carrying out the responsibilities and rights of the United States of America under this Article is set forth at the Annex. Also set forth in the Annex are procedures for the discontinuance or transfer of those activities performed prior to the entry into force of this Treaty by the Panama Canal Company or the Canal Zone Government which are not to be carried out by the Panama Canal Commission.

5. The Panama Canal Commission shall reimburse the Republic of Panama for the costs incurred by the Republic of Panama in providing the following public services in the Canal operating areas and in housing areas set forth in the Agreement in Implementation of Article III of this Treaty and occupied by both United States and Panamanian citizen employees of the Panama Canal Commission: police, fire protection, street

maintenance, street lighting, street cleaning, traffic management and garbage collection. The Panama Canal Commission shall pay the Republic of Panama the sum of ten million United States dollars ($10,000,000) per annum for the foregoing services. It is agreed that every three years from the date that this Treaty enters into force, the costs involved in furnishing said services shall be reexamined to determine whether adjustment of the annual payment should be made because of inflation and other relevant factors affecting the cost of such services.

6. The Republic of Panama shall be responsible for providing, in all areas comprising the former Canal Zone, services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing, in accordance with this Treaty and related agreements.

7. The United States of America and the Republic of Panama shall establish a Panama Canal Consultative Committee, composed of an equal number of high-level representatives of the United States of America and the Republic of Panama, and which may appoint such subcommittees as it may deem appropriate. This Committee shall advise the United States of America and the Republic of Panama on matters of policy affecting the Canal's operation. In view of both Parties' special interest in the continuity and efficiency of the Canal operation in the future, the Committee shall advise on matters such as general tolls policy, employment and training policies to increase the participation

of Panamanian nationals in the operation of the Canal, and international policies on matters concerning the Canal. The Committee's recommendations shall be transmitted to the two Governments, which shall give such recommendations full consideration in the formulation of such policy decisions.

8. In addition to the participation of Panamanian nationals at high management levels of the Panama Canal Commission, as provided for in paragraph 3 of this Article, there shall be growing participation of Panamanian nationals at all other levels and areas of employment in the aforesaid Commission, with the objective of preparing, in an orderly and efficient fashion, for the assumption by the Republic of Panama of full responsibility for the management, operation and maintenance of the Canal upon the termination of this Treaty.

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

10. Upon entry into force of this Treaty, the United States Government agencies known as the Panama Canal Company and the Canal Zone Government shall cease to operate within the territory of the Republic of Panama that formerly constituted the Canal Zone.

ARTICLE IV

Protection and Defense

1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date. The use of areas and installations and the legal status of the armed forces of the United States of America in the Republic of Panama shall be governed by the aforesaid Agreement.

3. In order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defense of the Canal, the United States of America and the Republic of Panama shall establish a Combined Board comprised of an equal number of senior military representatives of each Party. These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defense of the Canal,

and with planning for actions to be taken in concert for that purpose. Such combined protection and defense arrangements shall not inhibit the identity or lines of authority of the armed forces of the United States of America or the Republic of Panama. The Combined Board shall provide for coordination and cooperation concerning such matters as:

(a) The preparation of contingency plans for the protection and defense of the Canal based upon the cooperative efforts of the armed forces of both Parties;

(b) The planning and conduct of combined military exercises; and

(c) The conduct of United States and Panamanian military operations with respect to the protection and defense of the Canal.

4. The Combined Board shall, at five-year intervals throughout the duration of this Treaty, review the resources being made available by the two Parties for the protection and defense of the Canal. Also, the Combined Board shall make appropriate recommendations to the two Governments respecting projected requirements, the efficient utilization of available resources of the two Parties, and other matters of mutual interest with respect to the protection and defense of the Canal.

5. To the extent possible consistent with its primary responsibility for the protection and defense of the Panama Canal, the United States of America will endeavor to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of

that of the armed forces of the United States of America in the territory of the former Canal Zone immediately prior to the entry into force of this Treaty.

ARTICLE V

Principle of Non-Intervention

Employees of the Panama Canal Commission, their dependents and designated contractors of the Panama Canal Commission, who are nationals of the United States of America, shall respect the laws of the Republic of Panama and shall abstain from any activity incompatible with the spirit of this Treaty. Accordingly, they shall abstain from any political activity in the Republic of Panama as well as from any intervention in the internal affairs of the Republic of Panama. The United States of America shall take all measures within its authority to ensure that the provisions of this Article are fulfilled.

ARTICLE VI

Protection of the Environment

1. The United States of America and the Republic of Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall

give due regard to the protection and conservation of the environment.

2. A Joint Commission on the Environment shall be established with equal representation from the United States of America and the Republic of Panama, which shall periodically review the implementation of this Treaty and shall recommend as appropriate to the two Governments ways to avoid or, should this not be possible, to mitigate the adverse environmental impacts which might result from their respective actions pursuant to the Treaty.

3. The United States of America and the Republic of Panama shall furnish the Joint Commission on the Environment complete information on any action taken in accordance with this Treaty which, in the judgment of both, might have a significant effect on the environment. Such information shall be made available to the Commission as far in advance of the contemplated action as possible to facilitate the study by the Commission of any potential environmental problems and to allow for consideration of the recommendation of the Commission before the contemplated action is carried out.

ARTICLE VII

Flags

1. The entire territory of the Republic of Panama, including the areas the use of which the Republic of

Panama makes available to the United States of America pursuant to this Treaty and related agreements, shall be under the flag of the Republic of Panama, and consequently such flag always shall occupy the position of honor.

2. The flag of the United States of America may be displayed, together with the flag of the Republic of Panama, at the headquarters of the Panama Canal Commission, at the site of the Combined Board, and as provided in the Agreement in Implementation of Article IV of this Treaty.

3. The flag of the United States of America also may be displayed at other places and on some occasions, as agreed by both Parties.

ARTICLE VIII

Privileges and Immunities

1. The installations owned or used by the agencies or instrumentalities of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements, and their official archives and documents, shall be inviolable. The two Parties shall agree on procedures to be followed in the conduct of any criminal investigation at such locations by the Republic of Panama.

2. Agencies and instrumentalities of the Government of the United States of America operating in the

Republic of Panama pursuant to this Treaty and related agreements shall be immune from the jurisdiction of the Republic of Panama.

3. In addition to such other privileges and immunities as are afforded to employees of the United States Government and their dependents pursuant to this Treaty, the United States of America may designate up to twenty officials of the Panama Canal Commission who, along with their dependents, shall enjoy the privileges and immunities accorded to diplomatic agents and their dependents under international law and practice. The United States of America shall furnish to the Republic of Panama a list of the names of said officials and their dependents, identifying the positions they occupy in the Government of the United States of America, and shall keep such list current at all times.

ARTICLE IX

Applicable Laws and Law Enforcement

1. In accordance with the provisions of this Treaty and related agreements, the law of the Republic of Panama shall apply in the areas made available for the use of the United States of America pursuant to this Treaty. The law of the Republic of Panama shall be applied to matters or events which occurred in the former Canal Zone prior to the entry into force of this Treaty only to the extent specifically provided in prior treaties and agreements.

2. Natural or juridical persons who, on the date of entry into force of this Treaty, are engaged in business or non-profit activities at locations in the former Canal Zone may continue such business or activities at those locations under the same terms and conditions prevailing prior to the entry into force of this Treaty for a thirty-month transition period from its entry into force. The Republic of Panama shall maintain the same operating conditions as those applicable to the aforementioned enterprises prior to the entry into force of this Treaty in order that they may receive licenses to do business in the Republic of Panama subject to their compliance with the requirements of its law. Thereafter, such persons shall receive the same treatment under the law of the Republic of Panama as similar enterprises already established in the rest of the territory of the Republic of Panama without discrimination.

3. The rights of ownership, as recognized by the United States of America, enjoyed by natural or juridical private persons in buildings and other improvements to real property located in the former Canal Zone shall be recognized by the Republic of Panama in conformity with its laws.

4. With respect to buildings and other improvements to real property located in the Canal operating areas, housing areas or other areas subject to the licensing procedure established in Article IV of the Agreement in Implementation of Article III of this Treaty, the owners shall be authorized to continue using the land

upon which their property is located in accordance with the procedures established in that Article.

5. With respect to buildings and other improvements to real property located in areas of the former Canal Zone to which the aforesaid licensing procedure is not applicable, or may cease to be applicable during the lifetime or upon termination of this Treaty, the owners may continue to use the land upon which their property is located, subject to the payment of a reasonable charge to the Republic of Panama. Should the Republic of Panama decide to sell such land, the owners of the buildings or other improvements located thereon shall be offered a first option to purchase such land at a reasonable cost. In the case of non-profit enterprises, such as churches and fraternal organizations, the cost of purchase will be nominal in accordance with the prevailing practice in the rest of the territory of the Republic of Panama.

6. If any of the aforementioned persons are required by the Republic of Panama to discontinue their activities or vacate their property for public purposes, they shall be compensated at fair market value by the Republic of Panama.

7. The provisions of paragraphs 2-6 above shall apply to natural or juridical persons who have been engaged in business or non-profit activities at locations in the former Canal Zone for at least six months prior to the date of signature of this Treaty.

8. The Republic of Panama shall not issue, adopt or enforce any law, decree, regulation, or international

agreement or take any other action which purports to regulate or would otherwise interfere with the exercise on the part of the United States of America of any right granted under this Treaty or related agreements.

9. Vessels transiting the Canal, and cargo, passengers and crews carried on such vessels shall be exempt from any taxes, fees, or other charges by the Republic of Panama. However, in the event such vessels call at a Panamanian port, they may be assessed charges incident thereto, such as charges for services provided to the vessel. The Republic of Panama may also require the passengers and crew disembarking from such vessels to pay such taxes, fees and charges as are established under Panamanian law for persons entering its territory. Such taxes, fees and charges shall be assessed on a nondiscriminatory basis.

10. The United States of America and the Republic of Panama will cooperate in taking such steps as may from time to time be necessary to guarantee the security of the Panama Canal Commission, its property, its employees and their dependents, and their property, the Forces of the United States of America and the members thereof, the civilian component of the United States Forces, the dependents of members of the Forces and the civilian component, and their property, and the contractors of the Panama Canal Commission and of the United States Forces, their dependents, and their property. The Republic of Panama will seek from its

Legislative Branch such legislation as may be needed to carry out the foregoing purposes and to punish any offenders.

11. The Parties shall conclude an agreement whereby nationals of either State, who are sentenced by the courts of the other State, and who are not domiciled therein, may elect to serve their sentences in their State of nationality.

ARTICLE X

Employment with the Panama Canal Commission

1. In exercising its rights and fulfilling its responsibilities as the employer, the United States of America shall establish employment and labor regulations which shall contain the terms, conditions and prerequisites for all categories of employees of the Panama Canal Commission. These regulations shall be provided to the Republic of Panama prior to their entry into force.

2. (a) The regulations shall establish a system of preference when hiring employees, for Panamanian applicants possessing the skills and qualifications required for employment by the Panama Canal Commission. The United States of America shall endeavor to ensure that the number of Panamanian nationals employed by the Panama Canal Commission in relation to the total number of its employees will conform to the proportion established for foreign enterprises under the law of the Republic of Panama.

(b) The terms and conditions of employment to be established will in general be no less favorable to persons already employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, than those in effect immediately prior to that date.

3. (a) The United States of America shall establish an employment policy for the Panama Canal Commission that shall generally limit the recruitment of personnel outside the Republic of Panama to persons possessing requisite skills and qualifications which are not available in the Republic of Panama.

(b) The United States of America will establish training programs for Panamanian employees and apprentices in order to increase the number of Panamanian nationals qualified to assume positions with the Panama Canal Commission, as positions become available.

(c) Within five years from the entry into force of this Treaty, the number of United States nationals employed by the Panama Canal Commission who were previously employed by the Panama Canal Company shall be at least twenty percent less than the total number of United States nationals working for the Panama Canal Company immediately prior to the entry into force of this Treaty.

(d) The United States of America shall periodically inform the Republic of Panama, through the Coordinating Committee, established pursuant to the Agreement in Implementation of Article III of this Treaty, of available positions within the Panama Canal Commission. The Republic of Panama shall similarly provide the United

States of America any information it may have as to the availability of Panamanian nationals claiming to have skills and qualifications that might be required by the Panama Canal Commission, in order that the United States of America may take this information into account.

4. The United States of America will establish qualification standards for skills, training and experience required by the Panama Canal Commission. In establishing such standards, to the extent they include a requirement for a professional license, the United States of America, without prejudice to its right to require additional professional skills and qualifications, shall recognize the professional licenses issued by the Republic of Panama.

5. The United States of America shall establish a policy for the periodic rotation, at a maximum of every five years, of United States citizen employees and other non-Panamanian employees, hired after the entry into force of this Treaty. It is recognized that certain exceptions to the said policy of rotation may be made for sound administrative reasons, such as in the case of employees holding positions requiring certain non-transferable or non-recruitable skills.

6. With regard to wages and fringe benefits, there shall be no discrimination on the basis of nationality, sex, or race. Payments by the Panama Canal Commission of additional remuneration, or the provision of other benefits, such as home leave benefits, to United States nationals employed prior to entry into force of this

Treaty, to persons of any nationality, including Panamanian nationals who are thereafter recruited outside of the Republic of Panama and who change their place of residence, shall not be considered to be discrimination for the purpose of this paragraph.

7. Persons employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, who are displaced from their employment as a result of the discontinuance by the United States of America of certain activities pursuant to this Treaty, will be placed by the United States of America, to the maximum extent feasible, in other appropriate jobs with the Government of the United States in accordance with United States Civil Service regulations. For such persons who are not United States nationals, placement efforts will be confined to United States Government activities located within the Republic of Panama. Likewise, persons previously employed in activities for which the Republic of Panama assumes responsibility as a result of this Treaty will be continued in their employment to the maximum extent feasible by the Republic of Panama. The Republic of Panama shall, to the maximum extent feasible, ensure that the terms and conditions of employment applicable to personnel employed in the activities for which it assumes responsibility are no less favorable than those in effect immediately prior to the entry into force of this Treaty. Non-United States nationals employed by the Panama Canal Company or Canal Zone Government prior to the entry into force

of this Treaty who are involuntarily separated from their positions because of the discontinuance of an activity by reason of this Treaty, who are not entitled to an immediate annuity under the United States Civil Service Retirement System, and for whom continued employment in the Republic of Panama by the Government of the United States of America is not practicable, will be provided special job placement assistance by the Republic of Panama for employment in positions for which they may be qualified by experience and training.

8. The Parties agree to establish a system whereby the Panama Canal Commission may, if deemed mutually convenient or desirable by the two Parties, assign certain employees of the Panama Canal Commission, for a limited period of time, to assist in the operation of activities transferred to the responsibility of the Republic of Panama as a result of this Treaty or related agreements. The salaries and other costs of employment of any such persons assigned to provide such assistance shall be reimbursed to the United States of America by the Republic of Panama.

9. (a) The right of employees to negotiate collective contracts with the Panama Canal Commission is recognized. Labor relations with employees of the Panama Canal Commission shall be conducted in accordance with forms of collective bargaining established by the United States of America after consultation with employee unions.

(b) Employee unions shall have the right to affiliate with international labor organizations.

10. The United States of America shall provide an appropriate early optional retirement program for all persons employed by the Panama Canal Company or Canal Zone Government immediately prior to the entry into force of this Treaty. In this regard, taking into account the unique circumstances created by the provisions of this Treaty, including its duration, and their effect upon such employees, the United States of America shall, with respect to them:

(a) determine that conditions exist which invoke applicable United States law permitting early retirement annuities and apply such law for a substantial period of the duration of the Treaty;

(b) seek special legislation to provide more liberal entitlement to, and calculation of, retirement annuities than is currently provided for by law.

ARTICLE XI

Provisions for the Transition Period

1. The Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms. In order to provide for an orderly transition to the full application of the jurisdictional arrangements established by this Treaty and related agreements, the provisions of this Article shall become applicable upon the date this Treaty enters into force, and shall

remain in effect for thirty calendar months. The authority granted in this Article to the United States of America for this transition period shall supplement, and is not intended to limit, the full application and effect of the rights and authority granted to the United States of America elsewhere in this Treaty and in related agreements.

2. During this transition period, the criminal and civil laws of the United States of America shall apply concurrently with those of the Republic of Panama in certain of the areas and installations made available for the use of the United States of America pursuant to this Treaty, in accordance with the following provisions:

(a) The Republic of Panama permits the authorities of the United States of America to have the primary right to exercise criminal jurisdiction over United States citizen employees of the Panama Canal Commission and their dependents, and members of the United States Forces and civilian component and their dependents, in the following cases:

(i) for any offense committed during the transition period within such areas and installations, and

(ii) for any offense committed prior to that period in the former Canal Zone.

The Republic of Panama shall have the primary right to exercise jurisdiction over all other offenses committed by such persons, except as otherwise provided in this Treaty and related agreements or as may be otherwise agreed.

(b) Either Party may waive its primary right to exercise jurisdiction in a specific case or category of cases.

3. The United States of America shall retain the right to exercise jurisdiction in criminal cases relating to offenses committed prior to the entry into force of this Treaty in violation of the laws applicable in the former Canal Zone.

4. For the transition period, the United States of America shall retain police authority and maintain a police force in the aforementioned areas and installations. In such areas, the police authorities of the United States of America may take into custody any person not subject to their primary jurisdiction if such person is believed to have committed or to be committing an offense against applicable laws or regulations, and shall promptly transfer custody to the police authorities of the Republic of Panama. The United States of America and the Republic of Panama shall establish joint police patrols in agreed areas. Any arrests conducted by a joint patrol shall be the responsibility of the patrol member or members representing the Party having primary jurisdiction over the person or persons arrested.

5. The courts of the United States of America and related personnel, functioning in the former Canal Zone immediately prior to the entry into force of this

Treaty, may continue to function during the transition period for the judicial enforcement of the jurisdiction to be exercised by the United States of America in accordance with this Article.

6. In civil cases, the civilian courts of the United States of America in the Republic of Panama shall have no jurisdiction over new cases of a private civil nature, but shall retain full jurisdiction during the transition period to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty.

7. The laws, regulations, and administrative authority of the United States of America applicable in the former Canal Zone immediately prior to the entry into force of this Treaty shall, to the extent not inconsistent with this Treaty and related agreements, continue in force for the purpose of the exercise by the United States of America of law enforcement and judicial jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two Parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

8. During this transition period, the United States of America may continue to incarcerate individuals in the areas and installations made available for the use of the United States of America by the Republic of Panama pursuant to this Treaty and related agreements, or to transfer them to penal facilities in the United States of America to serve their sentences.

ARTICLE XII

A Sea-Level Canal or a Third Lane of Locks

1. The United States of America and the Republic of Panama recognize that a sea-level canal may be important for international navigation in the future. Consequently, during the duration of this Treaty, both Parties commit themselves to study jointly the feasibility of a sea-level canal in the Republic of Panama, and in the event they determine that such a waterway is necessary, they shall negotiate terms, agreeable to both Parties, for its construction.

2. The United States of America and the Republic of Panama agree on the following:

(a) No new interoceanic canal shall be constructed in the territory of the Republic of Panama during the duration of this Treaty, except in accordance with the provisions of this Treaty, or as the two Parties may otherwise agree; and

(b) During the duration of this Treaty, the United States of America shall not negotiate with third States for the right to construct an inter-oceanic canal on any other route in the Western Hemisphere, except as the two Parties may otherwise agree.

3. The Republic of Panama grants to the United States of America the right to add a third lane of locks to the existing Panama Canal. This right may be exercised at any time during the duration of this Treaty, provided that the United States of America has delivered to the Republic of Panama copies of the plans for such construction.

4. In the event the United States of America exercises the right granted in paragraph 3 above, it may use for that purpose, in addition to the areas otherwise made available to the United States of America pursuant to this Treaty, such other areas as the two Parties may agree upon. The terms and conditions applicable to Canal operating areas made available by the Republic of Panama for the use of the United States of America pursuant to Article III of this Treaty shall apply in a similar manner to such additional areas.

5. In the construction of the aforesaid works, the United States of America shall not use nuclear excavation techniques without the previous consent of the Republic of Panama.

ARTICLE XIII

Property Transfer and Economic Participation by the Republic of Panama

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for

the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and free of liens and debts, except as the two Parties may otherwise agree.

2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include buildings and other facilities, except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama in accordance with paragraph 5(b) of Annex B to the Agreement in Implementation of Article IV of this Treaty to such time as such units are made available to the Republic of Panama.

(d) Upon termination of this Treaty, all real property, and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements, and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal, in accordance with the following:

(a) An annual amount to be paid out of Canal operating revenues computed at a rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton, or its equivalency, for each vessel transiting the Canal, after the entry into force of this Treaty, for which tolls are charged. The rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton, or its equivalency, will be adjusted to reflect changes in the United States wholesale price index for total manufactured goods during biennial periods. The first adjustment shall take place five years after entry into force of this Treaty, taking into account the changes that occurred in such price index during the preceding two years. Thereafter successive adjustments shall take place at the end of each biennial period. If the United States of America should decide that another indexing method is preferable, such method shall be proposed to the Republic of Panama and applied if mutually agreed.

(b) A fixed annuity of ten million United States dollars ($10,000,000) to be paid out of Canal operating revenues. This amount shall constitute a fixed expense of the Panama Canal Commission.

(c) An annual amount of up to ten million United States dollars ($10,000,000) per year, to be paid out of Canal operating revenues to the extent that such revenues exceed expenditures of the Panama Canal Commission including amounts paid pursuant to this Treaty. In the event Canal operating revenues in any year do not produce a surplus sufficient to cover this payment, the unpaid balance shall be paid from operating surpluses in future years in a manner to be mutually agreed.

ARTICLE XIV

Settlement of Disputes

In the event that any question should arise between the Parties concerning the interpretation of this Treaty or related agreements, they shall make every effort to resolve the matter through consultation in the appropriate committees established pursuant to this Treaty and related agreements, or, if appropriate, through diplomatic channels. In the event the Parties are unable to resolve a particular matter through such means, they may, in appropriate cases, agree to submit the matter to conciliation, mediation, arbitration, or such other procedure for the peaceful settlement of the dispute as they may mutually deem appropriate.

ANNEX

Procedures for the Cessation or Transfer of Activities Carried out by the Panama Canal Company and the Canal Zone Government and Illustrative List of the Functions that may be Performed by the Panama Canal Commission

1. The laws of the Republic of Panama shall regulate the exercise of private economic activities within the areas made available by the Republic of Panama for the use of the United States of America pursuant to this Treaty. Natural or juridical persons who, at least six months prior to the date of signature of this Treaty, were legally established and engaged in the exercise of economic activities in the former Canal Zone, may continue such activities in accordance with the provisions of paragraphs 2-7 of Article IX of this Treaty.

2. The Panama Canal Commission shall not perform governmental or commercial functions as stipulated in paragraph 4 of this Annex, provided, however, that this shall not be deemed to limit in any way the right of the United States of America to perform those functions that may be necessary for the efficient management, operation and maintenance of the Canal.

3. It is understood that the Panama Canal Commission, in the exercise of the rights of the United States of America with respect to the management, operation and maintenance of the Canal, may perform functions such as are set forth below by way of illustration:

a. Management of the Canal enterprise.

b. Aids to navigation in Canal waters and in proximity thereto.

c. Control of vessel movement.

d. Operation and maintenance of the locks.

e. Tug service for the transit of vessels and dredging for the piers and docks of the Panama Canal Commission.

f. Control of the water levels in Gatun, Alajuela (Madden) and Miraflores Lakes.

g. Non-commercial transportation services in Canal waters.

h. Meteorological and hydrographic services.

i. Admeasurement.

j. Non-commercial motor transport and maintenance.

k. Industrial security through the use of watchmen.

l. Procurement and warehousing.

m. Telecommunications.

n. Protection of the environment by preventing and controlling the spillage of oil and substances harmful to human or animal life and of the ecological equilibrium in areas used in operation of the Canal and the anchorages.

o. Non-commercial vessel repair.

p. Air conditioning services in Canal installations.

q. Industrial sanitation and health services.

r. Engineering design, construction and maintenance of Panama Canal Commission installations.

s. Dredging of the Canal channel, terminal ports and adjacent waters.

t. Control of the banks and stabilizing of the slopes of the Canal.

u. Non-commercial handling of cargo on the piers and docks of the Panama Canal Commission.

v. Maintenance of public areas of the Panama Canal Commission, such as parks and gardens.

w. Generation of electric power.

x. Purification and supply of water.

y. Marine salvage in Canal waters.

z. Such other functions as may be necessary or appropriate to carry out, in conformity with this Treaty and related agreements, the rights and responsibilities of the United States of America with respect to the management, operation and maintenance of the Panama Canal.

4. The following activities and operations carried out by the Panama Canal Company and the Canal Zone Government shall not be carried out by the Panama Canal Commission, effective upon the dates indicated herein:

(a) Upon the date of entry into force of this Treaty:

(i) Wholesale and retail sales, including those through commissaries, food stores, department stores, optical shops and pastry shops;

(ii) The production of food and drink, including milk products and bakery products;

(iii) The operation of public restaurants and cafeterias and the sale of articles through vending machines;

(iv) The operation of movie theaters, bowling alleys, pool rooms and other recreational and amusement facilities for the use of which a charge is payable;

(v) The operation of laundry and dry cleaning plants other than those operated for official use;

(vi) The repair and service of privately owned automobiles or the sale of petroleum or lubricants, including the operation of gasoline stations, repair garages and tire repair and recapping facilities, and the repair and service of other privately owned property, including appliances, electronic devices, boats, motors, and furniture;

(vii) The operation of cold storage and freezer plants other than those operated for official use;

(viii) The operation of freight houses other than those operated for official use;

(ix) Commercial services to and supply of privately owned and operated vessels, including the construction of vessels, the sale of petroleum and lubricants and the provision of water, tug services not related to the Canal or other United States Government operations, and repair of such vessels, except in situations where repairs may be necessary to remove disabled vessels from the Canal;

(x) Printing services other than for official use;

(xi) Maritime transportation for the use of the general public;

(xii) Health and medical services provided to individuals, including hospitals, leprosariums, veterinary, mortuary and cemetery services;

(xiii) Educational services not for professional training, including schools and libraries;

(xiv) Postal services;

(xv) Immigration, customs and quarantine controls, except those measures necessary to ensure the sanitation of the Canal;

(xvi) Commercial pier and dock services, such as the handling of cargo and passengers; and

(xvii) Any other commercial activity of a similar nature, not related to the management, operation or maintenance of the Canal.

(b) Within thirty calendar months from the date of entry into force of this Treaty, governmental services such as:

(i) Police;

(ii) Courts; and

(iii) Prison system.

5. (a) With respect to those activities or functions described in paragraph 4 above, or otherwise agreed upon by the two Parties, which are to be assumed by the Government of the Republic of Panama or by private persons subject to its authority, the

two Parties shall consult prior to the discontinuance of such activities or functions by the Panama Canal Commission to develop appropriate arrangements for the orderly transfer and continued efficient operation or conduct thereof.

(b) In the event that appropriate arrangements cannot be arrived at to ensure the continued performance of a particular activity or function described in paragraph 4 above which is necessary to the efficient management, operation or maintenance of the Canal, the Panama Canal Commission may, to the extent consistent with the other provisions of this Treaty and related agreements, continue to perform such activity or function until such arrangements can be made.

AGREED MINUTE TO THE PANAMA CANAL TREATY

1. With reference to paragraph 1(c) of Article I (Abrogation of Prior Treaties and Establishment of a New Relationship), it is understood that the treaties, conventions, agreements and exchanges of notes, or portions thereof, abrogated and superseded thereby include:

(a) The Agreement delimiting the Canal Zone referred to in Article II of the Interoceanic Canal Convention of November 18, 1903 signed at Panama on June 15, 1904.

(b) The Boundary Convention signed at Panama on September 2, 1914.

(c) The Convention regarding the Colon Corridor and certain other corridors through the Canal Zone signed at Panama on May 24, 1950.

(d) The Trans-Isthmian Highway Convention signed at Washington on March 2, 1936, the Agreement supplementing that Convention entered into through an exchange of notes signed at Washington on August 31 and September 6, 1940, and the arrangement between the United States of America and Panama respecting the Trans-Isthmian Joint Highway Board, entered into through an exchange of notes at Panama on October 19 and 23, 1939.

(e) The Highway Convention between the United States and Panama signed at Panama on September 14, 1950.

(f) The Convention regulating the transit of alcoholic liquors through the Canal Zone signed at Panama on March 14, 1932.

(g) The Protocol of an Agreement restricting use of Panama and Canal Zone waters by belligerents signed at Washington on October 10, 1914.

(h) The Agreement providing for the reciprocal recognition of motor vehicle license plates in Panama and the Canal Zone entered into through an exchange of notes at Panama on December 7 and December 12, 1950, and the Agreement establishing procedures for the reciprocal recognition of motor vehicle operator's licenses in the Canal Zone and Panama entered into through an exchange of notes at Panama on October 31, 1960.

(i) The General Relations Agreement entered into through an exchange of notes at Washington on May 18, 1942.

(j) Any other treaty, convention, agreement or exchange of notes between the United States and the Republic of Panama, or portions thereof, concerning the Panama Canal which was entered into prior to the entry into force of the Panama Canal Treaty.

2. It is further understood that the following treaties, conventions, agreements and exchanges of notes between the two Parties are not affected by paragraph 1 of Article I of the Panama Canal Treaty:

(a) The Agreement concerning the cooperative agreement between the Panamanian Ministry of Agriculture and Livestock and the United States Department of Agriculture for the prevention of foot-and-mouth disease and rinderpest in Panama, entered into by an exchange of notes signed at Panama on June 21 and Ocotber 5, 1972, and amended May 28 and June 12, 1974.

(b) The Loan Agreement to assist Panama in executing public marketing programs in basic grains and perishables, with annex, signed at Panama on September 10, 1975.

(c) The Agreement concerning the regulation of commercial aviation in the Republic of Panama, entered into by an exchange of notes signed at Panama on April 22, 1929.

(d) The Air Transport Agreement signed at Panama on March 31, 1949, and amended May 29 and June 3, 1952, June 5, 1967, December 23, 1974, and March 6, 1975.

(e) The Agreement relating to the establishment of headquarters in Panama for a civil aviation technical assistance group for the Latin American area, entered into by an exchange of notes signed at Panama on August 8, 1952.

(f) The Agreement relating to the furnishing by the Federal Aviation Agency of certain services and materials for air navigation aids, entered into by an exchange of notes signed at Panama on December 5, 1967 and February 22, 1968.

(g) The Declaration permitting consuls to take note in person, or by authorized representatives, of declarations of values of exports made by shippers before customs officers, entered into by an exchange of notes signed at Washington on April 17, 1913.

(h) The Agreement relating to customs priviledges for consular officers, entered into by an exchange of notes signed at Panama on January 7 and 31, 1935.

(i) The Agreement relating to the sale of military equipment, materials, and services to Panama, entered into by an exchange of notes signed at Panama on May 20, 1959.

(j) The Agreement relating to the furnishing of defense articles and services to Panama for the purpose of contributing to its internal security, entered into by an exchange of notes signed at Panama on March 26 and May 23, 1962.

(k) The Agreement relating to the deposit by Panama of ten percent of the value of grant military assistance and excess defense articles furnished by the United States, entered into by an exchange of notes signed at Panama on April 4 and May 9, 1972.

(l) The Agreement concerning payment to the United States of net proceeds from the sale of defense articles furnished under the military assistance program, entered into by an exchange of notes signed at Panama on May 20 and December 6, 1974.

(m) The General Agreement for Technical and Economic Cooperation, signed at Panama on December 11, 1961.

(n) The Loan Agreement relating to the Panama City water supply system, with annex, signed at Panama on May 6, 1969, and amended September 30, 1971.

(o) The Loan Agreement for rural municipal development in Panama, signed at Panama on November 28, 1975.

(p) The Loan Agreement relating to a project for the modernization, restructuring and reorientation of Panama's educational programs, signed at Panama on November 19, 1975.

(q) The Treaty providing for the extradition of criminals, signed at Panama on May 25, 1904.

(r) The Agreement relating to legal tender and fractional silver coinage by Panama, entered into by an exchange of notes signed at Washington and New York on June 20, 1904, and amended March 26 and April 2, 1930, May 28 and June 6, 1931, March 2, 1936, June 17, 1946, May 9 and 24, 1950, September 11 and October 22, 1953, August 23 and October 25, 1961, and September 26 and October 23, 1962.

(s) The Agreement for enlargement and use by Canal Zone of sewerage facilities in Colon Free Zone Area, entered into by an exchange of notes signed at Panama on March 8 and 25, 1954.

(t) The Agreement relating to the construction of the inter-American highway, entered into by an exchange of notes signed at Panama on May 15 and June 7, 1943.

(u) The Agreement for cooperation in the construction of the Panama segment of the Darien Gap highway, signed at Washington on May 6, 1971.

(v) The Agreement relating to investment guaranties under sec. 413(b)(4) of the Mutual Security Act of 1954, as amended, entered into by an exchange of notes signed at Washington on January 23, 1961.

(w) The Informal Arrangement relating to cooperation between the American Embassy, or Consulate, and Panamanian authorities when American merchant seamen or tourists are brought before a magistrate's court, entered into by an exchange of notes signed at Panama on September 18 and October 15, 1947.

(x) The Agreement relating to the mutual recognition of ship measurement certificates, entered into by an exchange of notes signed at Washington on August 17, 1937.

(y) The Agreement relating to the detail of a military officer to serve as adviser to the Minister of Foreign Affairs of Panama, signed at Washington on July 7, 1942, and extended and amended February 17, March 23, September 22 and November 6, 1959, March 26 and July 6, 1962, and September 20 and October 8, 1962.

[illegible] The Agreement relating to the exchange of official publications, entered into by an exchange of notes signed at Panama on November 27, 1941 and March 7, 1942.

(aa) The Convention for the Prevention of Smuggling of Intoxicating Liquors, signed at Washington on June 6, 1924.

(bb) The Arrangement providing for relief from double income tax on shipping profits, entered into by an exchange of notes signed at Washington on January 15, February 8, and March 28, 1941.

(cc) The Agreement for withholding of Panamanian income tax from compensation paid to Panamanians employed within Canal Zone by the canal, railroad, or auxiliary works, entered into by an exchange of notes signed at Panama on August 12 and 30, 1963.

(dd) The Agreement relating to the withholding of contributions for educational insurance from salaries paid to certain Canal Zone employees, entered into by an exchange of notes signed at Panama on September 8 and October 13, 1972.

(ee) The Agreement for radio communications between amateur stations on behalf of third parties, entered into by an exchange of notes signed at Panama on July 19 and August 1, 1956.

(ff) The Agreement relating to the granting of reciprocal authorizations to permit licensed amateur radio operators of either country to operate their stations in the other country, entered into by an exchange of notes signed at Panama on November 16, 1966.

(gg) The Convention facilitating the work of traveling salesmen, signed at Washington on February 8, 1919.

(hh) The Reciprocal Agreement for gratis nonimmigrant visas, entered into by an exchange of notes signed at Panama on March 27 and May 22 and 25, 1956.

(ii) The Agreement modifying the Agreement of March 27 and May 22 and 25, 1956 for gratis nonimmigrant visas, entered into by an exchange of notes signed at Panama on June 14 and 17, 1971.

(jj) Any other treaty, convention, agreement or exchange of notes, or portions thereof, which does not concern the Panama Canal and which is in force immediately prior to the entry into force of the Panama Canal Treaty.

3. With reference to paragraph 2 of Article X (Employment with the Panama Canal Commission), concerning the endeavor to ensure that the number of Panamanian nationals employed in relation to the total number of employees will conform to the proportion established under Panamanian law for foreign business enterprises, it is recognized that progress in this regard may require an extended period in consonance with the concept of a growing and orderly Panamanian participation, through training programs and otherwise, and that progress may be affected from time to

time by such actions as the transfer or discontinuance of functions and activities.

4. With reference to paragraph 10(a) of Article X, it is understood that the currently applicable United States law is that contained in Section 8336 of Title 5, United States Code.

5. With reference to paragraph 2 of Article XI (Transitional Provisions), the areas and installations in which the jurisdictional arrangements therein described shall apply during the transition period are as follows:

(a) The Canal operating areas and housing areas described in Annex A to the Agreement in Implementation of Article III of the Panama Canal Treaty.

(b) The Defense Sites and Areas of Military Coordination described in the Agreement in Implementation of Article IV of the Panama Canal Treaty.

(c) The Ports of Balboa and Cristobal described in Annex B of the Agreement in Implementation of Article III of the Panama Canal Treaty.

6. With reference to paragraph 4 of Article XI, the areas in which the police authorities of the Republic of Panama may conduct joint police patrols with the police authorities of the United States of America during the transition period are as follows:

(a) Those portions of the Canal operating areas open to the general public, the housing areas and the Ports of Balboa and Cristobal.

(b) Those areas of military coordination in which joint police patrols are established pursuant to the provisions of the Agreement in Implementation of Article IV of this Treaty, signed this date. The two police authorities shall develop appropriate administrative arrangements for the scheduling and conduct of such joint police patrols.

DONE at Washington, this 7th day of September, 1977, in duplicate, in the English and Spanish languages, both texts being equally authentic.

TREATY
CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama have agreed upon the following:

ARTICLE I

The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama.

ARTICLE II

The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world. The foregoing shall be subject to the following requirements:

(a) Payment of tolls and other charges for transit and ancillary services, provided they have been fixed in conformity with the provisions of Article III (c);

(b) Compliance with applicable rules and regulations, provided such rules and regulations are applied in conformity with the provisions of Article III;

(c) The requirement that transiting vessels commit no acts of hostility while in the Canal; and

(d) Such other conditions and restrictions as are established by this Treaty.

ARTICLE III

1. For purposes of the security, efficiency and proper maintenance of the Canal the following rules shall apply:

(a) The Canal shall be operated efficiently in accordance with conditions of transit through the Canal, and rules and regulations that shall be just, equitable and reasonable, and limited to those necessary for safe navigation and efficient, sanitary operation of the Canal;

(b) Ancillary services necessary for transit through the Canal shall be provided;

(c) Tolls and other charges for transit and ancillary services shall be just, reasonable, equitable and consistent with the principles of international law;

(d) As a pre-condition of transit, vessels may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification, consistent with international practice and standards, for damages resulting from acts or omissions of such vessels when passing through the Canal. In the case of vessels owned or operated by a

State or for which it has acknowledged responsibility, a certification by that State that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal shall be deemed sufficient to establish such financial responsibility;

(e) Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as a condition of transit, to inspection, search or surveillance. However, such vessels may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations. In addition, such vessels shall be entitled to refuse to disclose their internal operation, origin, armament, cargo or destination. However, auxiliary vessels may be required to present written assurances, certified by an official at a high level of the government of the State requesting the exemption, that they are owned or operated by that government and in this case are being used only on government non-commercial service.

2. For the purposes of this Treaty, the terms "Canal," "vessel of war," "auxiliary vessel," "internal operation," "armament" and "inspection" shall have the meanings assigned them in Annex A to this Treaty.

ARTICLE IV

The United States of America and the Republic of Panama agr to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any othe treaties entered into by the two Contracting Parties.

ARTICLE V

After the termination of the Panama Canal Treaty, only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

ARTICLE VI

1. In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Trea be entitled to transit the Canal irrespective of their internal operation, means of propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels wil be entitled to transit the Canal expeditiously.

2. The United States of America, so long as it has responsibility for the operation of the Canal, may continue to provide the Republic of Colombia toll-free transit through the Canal for its troops, vessels and materials of war. Thereafter, the Republic of Panama may provide the Republic of Colombia and the Republic of Costa Rica with the right of toll-free transit.

ARTICLE VII

1. The United States of America and the Republic of Panama shall jointly sponsor a resolution in the Organization of American States opening to accession by all States of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this Treaty, agreeing to respect the regime of neutrality set forth herein.

2. The Organization of American States shall act as the depositary for this Treaty and related instruments.

ARTICLE VIII

This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Panama Canal Treaty, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments of ratification.

DONE at Washington, this 7th day of September, 1977, in duplicate, in the English and Spanish languages, both texts being equally authentic.

ANNEX A

1. "Canal" includes the existing Panama Canal, the entrances thereto and the territorial seas of the Republic of Panama adjacent thereto, as defined on the map annexed hereto (Annex B), and any other inter-oceanic waterway in which the United States of America is a participant or in which the United States of America has participated in connection with the construction or financing, that may be operated wholly or partially within the territory of the Republic of Panama, the entrances thereto and the territorial seas adjacent thereto.

2. "Vessel of war" means a ship belonging to the naval forces of a State, and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew which is under regular naval discipline.

3. "Auxiliary vessel" means any ship, not a vessel of war, that is owned or operated by a State and used, for the time being, exclusively on government non-commercial service.

4. "Internal operation" encompasses all machinery and propulsion systems, as well as the management and control of the vessel, including its crew. It does not include the measures necessary to transit vessels under the control of pilots while such vessels are in the Canal.

5. "Armament" means arms, ammunition, implements and other equipment of a vessel which possesses characteristics appropriate for use for warlike purposes.

6. "Inspection" includes on-board examination of vessel structure, cargo, armament and internal operation. It does not include those measures strictly necessary for admeasurement, nor those measures strictly necessary to assure safe, sanitary transit and navigation, including examination of deck and visual navigation equipment, nor in the case of live cargoes, such as cattle or other livestock, that may carry communicable diseases, those measures necessary to assure that health and sanitation requirements are satisfied.

PROTOCOL TO THE TREATY CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

Whereas the maintenance of the neutrality of the Panama Canal is important not only to the commerce and security of the United States of America and the Republic of Panama, but to the peace and security of the Western Hemisphere and to the interests of world commerce as well;

Whereas the regime of neutrality which the United States of America and the Republic of Panama have agreed to maintain will ensure permanent access to the Canal by vessels of all nations on the basis of entire equality;

Whereas the said regime of effective neutrality shall constitute the best protection for the Canal and shall ensure the absence of any hostile act against it;

The Contracting Parties to this Protocol have agreed upon the following:

ARTICLE I

The Contracting Parties hereby acknowledge the regime of permanent neutrality for the Canal established in the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and associate themselves with its objectives.

ARTICLE II

The Contracting Parties agree to observe and respect the regime of permanent neutrality of the Canal in time of war as in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules.

ARTICLE III

This Protocol shall be open to accession by all states of the world, and shall enter into force for each State at the time of deposit of its instrument of accession with the Secretary General of the Organization of American States.

JULY 29, 1977

PANAMA CANAL

MEMO TO: EDITORS, NEWS DIRECTORS

FROM: THE MEDIA LIAISON OFFICE
THE WHITE HOUSE

The negotiations on a new treaty for the Panama Canal, in progress for several months, have drawn increased attention. Here is a report on the background of the Panama Canal and the various issues and factors involved in this complex issue.

This fact sheet is in three parts: First, historical summary; Second, questions and answers on the current situation; Third, excerpts from a briefing for editors given at the White House on June 15 by U.S. co-negotiator Ambassador Sol Linowitz.

Please direct further questions to Media Liaison, The White House, and to Patricia Bario or James Purks, 202/456-6623 or 2947.

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HISTORICAL SUMMARY

FACTS

Constructed:	1904-1914
Opened:	August 15, 1914
Cost:	$387 million ($690 million has been paid back to the U. S. Treasury from Canal revenues.)
Length:	51 miles, deep water to deep water

Land area of the Canal Zone:	647 square miles including tidal water. The Zone extends generally 5 miles on each side of the Panama Canal from deep water in the Atlantic Ocean to deep water in the Pacific.
Airline distance:	Balboa (Pacific) to Cristobal (Caribbean side), 36 miles
Total Ship Transits Fiscal 1976:	13,201
Average Daily Transits:	33.6
Total Cargo, Fiscal 1976:	117,402 (in thousands of long tons)
1 Annual payments to Republic of Panama:	$2,328,000
2 Administration:	The Canal Zone, under terms of the 1903 Hay-Bunau-Varilla Treaty, is under the jurisdiction of the United States and is administered under United States laws. By law, the Canal Zone government is an independent agency of the U. S. Government. It is headed by a governor, appointed by the President for a four-year term. The governor serves as president of the Panama Canal Company.
Panama Canal Company:	A corporate agency of the U. S. Government. It operates under a Board of Directors appointed by the Secretary of the Army. The Company is responsible for all operations involved in the movement of ships through the Canal and controls vessel repairs, harbor terminals, a railroad, an electrical power system, a water system, communications system, living quarters, retail stores and a supply ship operating between the Zone and the United States.
American Population in Canal Zone:	37,500 (estimate)

CHRONOLOGY

February, 1881 - French engineers began work on a sea-level canal. The French effort encountered construction and financial difficulties in ensuing years.

3 June 28, 1902 - Congress approved the Spooner Act, authorizing President Theodore Roosevelt to buy the rights and property of the French company for $40 million, providing Colombia would provide a strip of land across the Isthmus of Panama to be controlled by the United States for the Canal route.

4 January 22, 1903 - The Hay-Herran Treaty between the U. S. and Colombia was signed in Washington giving the U. S. the rights to build, operate and control a canal in Panama for 100 years. The treaty was ratified by the U. S. Senate in March.

August, 1903 - The Colombian Senate refused to ratify the treaty.

5 November 3, 1903 - A revolt in Panama created the independent nation of Panama, and U. S. naval vessels prevented Colombian troops from landing to put down the revolt. The new nation was recognized by the United States on November 6.

6 November 18, 1903 - The United States and Panama's provisional government signed the Hay-Bunau-Varilla Treaty. It granted the United States the exclusive right in perpetuity to build and operate a canal across Panamanian territory and all the rights it would possess as if it were sovereign. The U. S. agreed to pay Panama $10 million and $250,000 annually beginning in 1913.

May 4, 1904 - French rights and properties were formally purchased by and transferred to the United States and preliminary work on the canal was begun at once.

August 15, 1914 - The Panama Canal was officially opened.

1936 - The U. S. and Panama signed a treaty, modifying the 1903 treaty, with the U. S. agreeing to increase the annuity paid to Panama from $250,000 to $430,000 annually. The treaty also deleted the clause in the 1903 treaty which gave the U. S. the right to intervene in the internal affairs of Panama.

7 1955 - Another treaty was signed, again modifying agreements, increasing the annual annuity to Panama to $1,930,000 and increasing the number of Panamanians permitted to operate the canal.

8 ✓ 1959 and 1964 - Dissatisfaction in Panama over the Panama Canal treat resulted in demonstrations in 1959 and riots in 1964. Three U. S. soldiers and 21 Panamanians were killed in the 1964 riots.

June, 1967 - A joint announcement was made that draft treaties had been completed. Negative reaction in the U. S. and Panama to the new treaties precluded any progress towards ratification.

1973 - President Nixon appointed Ellsworth Bunker to resume negotiations on a new treaty.

9 ✓ February, 1974 - Secretary of State Kissinger and Panamanian Foreign Minister Tack signed a joint statement of principles, setting the out line for the negotiations.

1974 - 1977 -- Treaty negotiations continued.

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QUESTIONS AND ANSWERS

10 Q: Why do the Panamanians want a new Panama Canal treaty?

A: The 10-mile-wide Panama Canal Zone divides their country in half and is owned, operated and ruled by a foreign nation, the United Stat Panamanians cannot traverse the zone without coming under the civil authority of the U. S. The canal and surrounding land is operated

under a treaty which says it will be run by another country in perpetuity. Panamanians know this treaty was signed 70 years ago between
the United States and a new country whose creation was largely the
result of American power. A Frenchman with a financial stake in the
11 old canal drafted and signed the treaty for Panama.

Private business is not allowed in the zone. The U. S. Government
12 controls all facilities servicing Panama's deepwater ports. The U.S.
exercises power over the territory with a police force, courts and
13 jails which enforce American law on Panamanians as well as Americans.
The Panamanian has observed the contrast between the subsidized standard
14 of living and lifestyle of the American Zonians and the lower
income levels of fellow Panamanian citizens. Panamanians compose
about two-thirds of the work force in the canal, but take home one-third of the total wages. Objections also are raised to the stationing
15 of U. S. troops in the zone for other reasons than to defend the
canal -- something which is not permitted by the 1903 treaty. These
factors, and others, combine to make the Panama Canal a political,
economic, social, patriotic and emotional issue to the Panamanians
and they believe a new treaty recognizing their rights is essential.

Q: What is the viewpoint of Americans opposed to treaty negotiations?

A: They assert that American money, ingenuity and hard work built the Panama Canal. It remains today a true world wonder and engineering accomplishment of unprecedented scale. It was "the moon shot" of the early 1900s. It is a source of immediate pride, and it's ours. The treaty says the United States can operate the canal and surrounding zone "as if it were sovereign," and the treaty is not subject to negotiation. There is no compelling reason to negotiate. Opponents to a new treaty also say that the canal is too vital both strategically and economically to give up, in particular to a small country that is governed by what many allege to be leftist and undemocratic. They also say the United States is yielding to pressure from radicals who are trying to appease anti-American and Communist influences in Panama and the Western Hemisphere.

Fears also are expressed about the loss of American jobs in the zone.
Canal Zone residents are concerned about their future. The average
American may never see the canal, but he or she immediately associates
it with hard-won accomplishment and national pride. As in the case
16 of the Panamanians' viewpoint, these factors combine to make the issue
emotional.

Q: What does the rest of Latin America think about the Panama Canal issue?

17 A: Latin America, often divided, is united on the issue of the need for a new Panama Canal Treaty. Latin American nations unanimously oppose continued U. S. control of the Panama Canal under the 1903 treaty terms. When Mrs. Carter recently visited Latin American countries, this issue was raised consistently. Latin America sees the canal and the 1903 treaty as a relic of American colonialism. The existence of a U. S.-controlled canal, subject to perpetual rule, is a festering wound to them. It revives memories of past intervention in Latin American affairs.

Q: If the Panama Canal stirs up such strong emotions in the United States, and is sometimes an unpopular cause to embrace politically, why negotiate for a new treaty?

A: A new treaty is being negotiated because it is the opinion of the Carter Administration, Latin America and nations of the Third World, that the terms of the 1903 treaty no longer reflect the many changes which have occurred in Panama, the U. S. and the world in the past decades. We are negotiating because it is believed this is the best 18 way to protect America's basic national interest in an open, efficient neutral and secure canal.

19 The canal is important to the United States, though less than in earlier years, and we believe a new treaty with arrangements more acceptable to Panama will be more protective of the Canal than the present treaty, which is outmoded and a source of hostility.

Q: Is the Panama Canal the sovereign property of the United States?

20 A: No. The United States has all the rights, power, and authority to conduct its activities in the zone, "as if it were sovereign," not as the sovereign.

Q: What is the economic status of the canal?

A: The canal is still an important link for the trade routes, but the economic picture is more difficult now. In 1975, about 12 percent of all United States export and import waterborne tonnage used the Panama route. The canal carries 7 percent of our trade between the East and West Coasts and 8 percent of our foreign trade is in canal traffic -- 1 percent of our Gross National Product. However, the canal's economic status is such that some economists say it is no longer as valuable as in the first two decades of existence, but in recent years it has run at a loss. From 1973-76, the canal lost about $29 million and during the same period canal traffic decreased from 39 ships a day to 33. In November, 1976, President Ford approved a 19.5% toll increase to try to lower canal deficits -- the third toll increase since 1974, when the rates were raised for the first time since the canal was opened in 1914.

Q: What are some of the factors behind the drop in daily traffic?

A: The new, larger ships -- such as the supersized cargo ships -- cannot go through the 63-year-old waterway. Another factor is the so-called "minibridge system." The minibridge concept allows steamship companies to have a single rate for a container that is sent from the East Coast of the United States to the West Coast by rail, and then by ship to the Far East. This new system was inaugurated in 1972 and in its first 18 months the ports lost more than 50,000 containers to minibridge traffic and most of this traffic would otherwise have used the Panama Canal.

Q: Militarily, does the canal have an important strategic role?

A: Not since the United States established a two-ocean navy, and
21 built aircraft carriers that are too big to go through the canal.
However, it is still an important defense asset to the United States
because it does facilitate the movement of military supplies.

Q: Why is the canal's strategic importance now diminished?

A: Because larger aircraft carriers cannot move through it and submarines would have to surface during transit. Also, the canal is 22 vulnerable to attack. Military officials generally agree that it would be extremely difficult to prevent canal closure by an air attack or by skilled sabotage.

Q: How large is the military establishment in the Canal Zone?

A: The United States is responsible for the defense of the Canal and Canal Zone. There is a military community of about 23,500 including dependents. Actual combat and support forces number about 9,400 and there are four administrative installations in the zone and 22 submarine bases. The Canal Zone is the headquarters for the Joint United States Southern Command. This office directs military assistance programs in other Latin American countries. Also in the Zone are headquarters of the U. S. Army Forces Southern Command, the United States Naval Forces Southern Command, the United States Air Forces Southern Command. They operate schools for Latin American armed forces students.

Q: What assurances do we have that, should Panama take over operation of the canal, that it could be run efficiently and without sharp increases in rates?

A: Under the proposed terms of a new treaty now being discussed, the 23 United States would in effect have until the year 2000 to train Panama in operations of the canal. Since the canal is so vital to Panama's economy, sharp increases in rates would drive down its use and, therefore, only result in diminishing revenues for Panama. Panama's national and economic self-interest rely on operating the canal efficiently, with neutrality, and with reasonable rates to encourage continued use by all nations. Panama must keep the canal competitive with other transportation modes.

Q: Suppose at some future date internal or external developments constitute a threat to the canal. What could we do?

24 A: Under the new treaty we clearly would have the right to defend the canal against military actions directed against the canal. Also, we intend to have adequate assurances that the canal always will be open to the ships of all nations on a non-discriminatory basis and that our security interest in the canal will be protected. In the transition period to 2000, the U. S. will be training the Panamanian military in protection of the canal. During the life of the proposed new treaty, the U. S. will be responsible for primary defense of the

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Q: General Omar Torrijos appears to be a strong-armed ruler. Is his government leftist? Is it a dictatorship? Will it remain in power long enough to negotiate a new treaty and make it acceptable to the Panamanian people?

25 A: Panama's current government has been in power since 1968 and shows considerable stability. All Panamanian factions, no matter what their political ideology, want a new canal treaty and a more equitable relationship with the United States, so acceptance by the Panamanian people is not considered a problem if the treaty is fair. The Panamanian government is not a democracy as we understand that term, but slogans are not accurate for the Torrijos government. The Torrijos regime is strongly nationalist and populist and concerned about its political independence. Settlement of the treaty issue would remove the major issue which radical elements could exploit in Panama against the U. S.

MEMORANDUM

TO: U.S. Senate Steering Committee

FROM: Senator Orrin G. Hatch

DATE: 11 August 1977

RE: Panama Canal

This Memorandum is a response to the Panama Canal Memorandum sent by the White House Media Liaison Office to editors and news directors throughout the United States on July 29, 1977.

The White House Memorandum, in my judgment, is not only misleading, but also contains a number of factual and historical errors. The American people, who deserve to know the truth about the Panama Canal Treaty, cannot meaningfully and effectively participate in the upcoming debate on this issue if they are deceived into believing the so-called "facts" that are presented in the White House Memorandum.

In the interest of accuracy, I offer for your consideration the following information:

1. The White House Memo states (p.2) that:

"Annual payments to the Republic of Panama (are) $2,328,000."

Comment: This statement does not tell the whole story. Of the $2,328,000 annuity for 1976, the Panama Canal Company paid $518,718 and the State Department paid $1,809,282. But far more important is the fact that in 1976 the total benefits to Panama from all U.S. sources in the Canal Zone, including the annuity, was $243,197,000. This sum is rarely mentioned by the State Department. Nevertheless, it has given Panama the highest per capita income in all of Central America and encouraged about one third of Panama's population to live near the Canal Zone.

2. The White House Memo states (p. 2) that:

> "The Canal Zone, under the terms of the 1903 Hay-Bunau-Varilla Treaty, is under the jurisdiction of the United States and is administered under United States laws."

Comment: This statement is not an accurate reflection of the actual situation. The 1903 Treaty grants the United States full sovereign rights, power and authority to the "entire exclusion" of their exercise by Panama. On November 16, 1910, at a banquet in Panama City given by President Obaldia, President Taft made this formal statement:

> "We are here to construct, maintain, operate, and defend a world Canal, which runs through the heart of your country, and you have given us the necessary sovereignty and jurisdiction over the part of your country occupied by that canal to enable us to do this effectively." (Canal Record, Vol. IV (Nov. 23, 1910), P. 100)

It should not be overlooked that there are two types of areas under the control by the United States on the Isthmus: the U.S. Canal Zone with full sovereign rights, power and authority and certain small areas such as the lighthouse at Cape Mala that are not U.S. territory and are under the jurisdiction of Panama.

3. The White House Memo states (p. 3) that:

> "June 28, 1902 - Congress approved the Spooner Act, authorizing President Theodore Roosevelt to buy the rights and property of the French company for $40 million, providing Colombia would provide a strip of land across the Isthmus of Panama to be controlled by the United States for the Canal Route."

Comment: This is not an adequate summation of the main points in the Spooner Act, which Act, in accordance with recommendations of the Isthmian Canal Commission, authorized the President to accomplish the following:

a. Acquisition by treaty with Colombia of "perpetual control" of what is today the Canal Zone;

b. Construction and the "perpetual" maintenance, operation and protection of the Panama Canal;

c. "Perpetual" maintenance and operation of the Panama Railroad; and

d. "Establishment of a government for the Canal Zone; and

e. In the event of our inability to obtain a satisfactory title to the French canal properties and control of the necessary territory from Colombia, the President was authorized to acquire "perpetual control" by treaty with Nicaragua and Costa Rica of the necessary territory at the Nicaragua site and to construct an Isthmian canal there.

4. The White House Memo states (p. 3) that:

> "January 22, 1903 - The Hay-Herran Treaty between the United States and Colombia was signed in Washington giving the U.S. the rights to build, operate and control a canal in Panama for 100 years. The treaty was ratified by the U.S. Senate in March."

Comment: Although this treaty did not fully comply with the provisions of the Spooner Act, it did grant to the United States a Canal Zone five kilometers in width on each side of the canal for a term of 100 years "renewable at the sole and absolute option of the United States," which was essentially a grant in perpetuity differently expressed.

The U.S. control of the area contemplated one of extra-territorial character, with U.S. police and Colombian police, U.S. Courts and Colombian courts.

As to ratification, this action by the U.S. Senate in March 1903 prior to consideration by Colombia was a serious error.

5. The White House Memo states (p. 3) that:

> "November 3, 1903 -- A revolt in Panama created the independent nation of Panama, and U.S. naval vessels prevented Colombian troops from landing to put down the revolt. The new nation was recognized by the United States on November 6."

Comment: The statement that U.S. naval vessels on November 3, 1903, prevented Colombian troops from landing is false.

It is true that the U.S.S. Nashville arrived at Colon about 5:30 p.m. on November 2. About midnight of that day, the Colombian warship Cartagena anchored at Colon with 474 Colombian soldiers under General Juan B. Tovar.

The next morning, November 3, the Commanding Officer of the Nashville visited the Cartagena at daylight. About 8:00 a.m., the Cartagena got under way, passed close to the Nashville, landed at a dock, and about 8:30 a.m. disembarked her troops. See M. DuVal, Cadiz to Cathay (Stanford U. Press, 1940), pp. 322-323).

There was no interference by the Nashville with the indicated landing of Colombian troops as stated in the White House release.

6. The White House Memo states (p. 3) that:

> "November 18, 1903 - The United States and Panama's provisional government signed the Hay-Bunau-Varilla Treaty. It granted the United States the exclusive right in perpetuity to build and operate a canal across Panamanian territory and all the rights it would possess as if it were sovereign. The U.S. agreed to pay Panama $10 million and $250,000 annually beginning in 1913."

Comment: To avoid confusion, significant parts of Articles II and III of the 1903 Treaty are quoted:

"The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal..." with "all rights, power and authority within the zone...which the United States would possess and exercise if it were sovereign of the territory...to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." The treaty provisions are unmistakably clear, a grant of supreme power, which is sovereignty.

It is important to note that the White House's use of the term "as if, is not accurate. The term used in the Treaty is "which the United States would possess if it were sovereign of the territory" and not "as if."

The reason for the grant of "sovereignty en bloc" was that in the Senate in 1904 there was a strong group advocating a canal at Nicaragua ready to seize upon any issue, such as what attributes of sovereignty were to be granted, as a means of defeating the treaty for the Panama Canal.

American leaders in the early 20th Century, including lawyers, historians, members of the U.S. Supreme Court, and a U.S. President, all viewed the 1903 Treaty as a "treaty of cession," the Canal Zone as "American soil" and the United States as its "owner," with both "sovereignty and jurisdiction" over it.

Another important aspect is that the $250,000 annuity was not a "rental" for the Canal Zone but the concessionary obligation of the Panama Railroad previously paid to Colombia that was assumed by the United States in the 1903 Treaty for the reason that the railroad was to be used in constructing the canal and its subsequent operation and the United States was to be the owner of the railroad.

Other aspects in the subject ignored are the obligations under the 1905 Hay-Pauncefolt Treaty with Great Britain and the 1914-22 Thomson-Arrutia Treaty with Colombia.

The 1901 Treaty was negotiated with Edward the Seventh of Great Britain. The former dominions and successor states to the British Empire inherit canal treaty rights, which they may demand be safeguarded.

In the 1914-22 Treaty, Colombia has important treaty interests in both the canal and railroad.

7. The White House Memo states (p. 4) that:

> "1955 -- Another treaty was signed, again modifying agreements, increasing the annual annuity to Panama to $1,930,000 and increasing the number of Panamanians permitted to operate the canal."

Comment: This treaty was negotiated without prior Congressional authority but contained provisions making the disposal of U.S. property in the Republic of Panama subject to the enactment of legislation by the Congress. (1955 Treaty, Article V.) The 1955 Treaty also contained provisions for adjusting the annuity of $1,930,000 so as to cover future U.S. devaluations. (1955 Treaty, Article I.)

As previously stated, the annuity in 1976 was $2,328,000 but the total benefits, including the annuity to Panama, from U.S. Canal Zone sources in that year were $243,190,000.

8. The White House Memo states (p. 4) that:

> "1959 and 1964 - Dissatisfaction in Panama over the Panama Canal treaty resulted in demonstrations in 1959 and riots in 1964. Three U.S. soldiers and 21 Panamanians were killed in the 1964 riots."

Comment: The demonstrations on November 3 and 28, 1959, were not spontaneous uprisings of the general population but the organized efforts of revolutionary activists, among them Aquilino Boyd, a former Minister of Foreign Affairs. (Hse. Doc. No. 474, 89th Congress, pp. 143-49.) The one on November 28 required the assistance of the U.S. Army to repel the attempted invasion and to protect the canal from "lawlessness and disorder" - a U.S. treaty responsibility.

The more serious attempted mob invasion of the Canal Zone on January 9-12, 1964, was the result of prolonged preparation and was foreseen by local residents. The Panama Government kept its national guard in their barracks with the result that the U.S. Army was again required to repel the mobs and protect the canal. (Hse. Doc. No. 474, 89th Congress, pp. 305-44.)

So far as known no list of American properties damaged in Panama or atrocities committed against Americans was ever published.

In spite of the crisis on 9-12 January 1964, the Panama Canal continued to transit vessels without interruption. This is a tribute to the effectiveness of our canal policy in protecting the canal against "lawlessness and disorder."

The historical record of the Isthmus, 1850 to 1977, shows that it is a land prone to revolution. Since 1940, however, the U.S. Canal Zone has been an area of stability in a region of endless political intrigue. It has often served as a haven of refuge for Panamanian leaders seeking to escape assassination. (Speller, Panama Canal: Heart of America's Security, 1972, pp. 130-41; and Gustave Arquizola, The Panama Canal: Isthmian Political Instability from 1821 to 1976, 1976.)

A recent example of such use of the canal by Panamanians is the case of Senora Torrijos, who on 15 December 1969 fled there during an attempt to depose her husband.

9. The White House Memo states (p. 4) that:

> "February, 1974 - Secretary of State Kissinger and Panamanian Foreign Minister Tack signed a joint statement of principles setting the outline for negotiations."

Comment: This 8-point agreement, signed without prior authorization by the Congress, can now be seen as a blueprint for an ignominous surrender of U.S. sovereign control over the Canal Zone to Panama.

10. The White House Memo states (p. 4) that:

> "The 10-mile-wide Panama Canal Zone.. is owned, operated and ruled by... the United States..."

Comment: This is a correct statement so far as it goes and contradicts the public statements of State Department officials. (See article on Congressman Gene Snyder's telegram on this point in Washington Post, August 6, 1977, p. A12.)

The Canal Zone is an unincorporated territory of the United States over which the United States holds full sovereign rights, power and authority.

11. The White House Memo states (p. 5) that:

> "A Frenchman with a financial stake in the old canal drafted and signed the treaty for Panama."

Comment: This is a grossly misleading statement, referring to Phillippe Bunau-Varilla. As a young man he had served as Acting Chief Engineer of the French Panama Canal Company and understood Isthmian matters very well. Highly connected in both France and the United States as well as Panama, he was the best choice that could have been made for appointment as the first Minister of Panama to the United States. He rendered great services to Panama, the United States, France and the Panama Canal.

Although he may have provided some of the major ideas embodied in the 1903 Treaty, there were others involved in its preparation, including Secretary Hay and other officials of the State Department.

He had made a lifetime study of the Panama Canal and was eminently qualified for the task of aiding in the choice of the Panama site in the "battle of the routes" and the creation of the Republic of Panama.

12. The White House Memo states (p. 5) that:

> "The U.S. Government controls all facilities servicing Panama's deepwater ports."

Comment: The ports evidently in mind are those of Cristobal and Balboa, the terminal ports of the Panama Canal, both of which are located in the U.S. Canal Zone and not in Panama.

The maintenance and operation of these ports for ocean vessels of all nations is a highly technical responsibility requiring constant supervision. Panama is a technologically underdeveloped country with neither the resources nor the competence to undertake such responsibility as seen in its failure to maintain the Boyd-Roosevelt Highway.

The facilities of both Cristobal and Balboa are available for all who pay the required charges, including Panamanians.

13. The White House Memo states (p. 5) that:

> "The U.S. exercises power over the territory with a police force, courts and jails which enforce American law on Panamanians as well as Americans."

Comment: This is fortunate. Anyone familiar with the practices of Panamanian law enforcement would prefer American justice in preference to the other. Many examples could be cited of cruel and unusual punishments being inflicted upon Americans in the clutches of Panamanian law. Detentions and harassments of U.S. citizens in Panama are well-known and have been reported to the Congress.

Because of the uncertainties involved there has been a sharp increas in resignations by U.S. citizens from Panama Canal employment. They prefe not to take a chance on living under Panamanian law. Such attrition will surely make it increasingly difficult to operate the canal in an efficient manner. How many American technical experts that are needed to run the canal will stay on if they are required to forfeit their constitutional rights and live under the laws and "justice" of Panama? The White House Memo makes no mention of this problem.

14. The White House Memo states (p. 5) that:

> "The Panamanian has observed the contrast between the subsidized standard of living and lifestyle of American Zonians and the lower income levels of fellow Panamanians."

Comment: Such a comparison can be drawn between the living conditions of Americans and the peoples of most countries, but the giveaway of American property, whether in Panama or any other place, cannot be justified on grounds of envy.

In truth, Canal Zone employees pay rent for their homes there, which are no better than homes of Americans of similar income levels in the states.

As Governor Parfitt stated in recent Senate hearings, "We have quite a wide range of quality of housing. I would say that it is modest and represents a kind of middle America. Except for the Governor's house there are no really resplendent quarters."

15. The White House Memo states (p. 5) that:

> "Objections also are raised to the stationing of U.S. troops in the Zone for other reasons than to defend the Canal - something which is not permitted by the 1903 Treaty."

Comment: One of the major treaty responsibilites of the United States is protection of the canal from "lawlessness and disorder," which includes the fortification of the Canal Zone to protèct against aggression.

The Isthmus of Panama has always been an object for predatory attack because its location is strategic and it probably always will be.

Among the major U.S. responsibilities under the 1903 Treaty is "protection." It was successfully protected during World Wars I and II, the Korean and Viet Nam Wars, the Cuban missile crisis, and the 1964 attempted Red-led mob invasion.

16. The White House Memo states (p. 6) that:

> "Latin America, often divided, is united on the issue of the need for a new Panama Canal Treaty."

Comment: A false statement that will not bear close investigation. Members of the Congress recently visiting major South American countries have reported that they have discussed the canal question with many political leaders and found strong opposition to the surrender of the Canal Zone to Panama; for Latin Americans know what the consequences would be to the well-being of their own countries. (See Mario Lazo, Panama Canal Giveaway: A Latin American View, Washington, D. C., Council for Inter-American Security, 1977; Hon. Spruille Braden, "Soviet Threat to Panama Canal," as reprinted in Congressional Record, June 1, 1977, p. H5235.)

17. The White House Memo states (p. 6) that:

> "We are negotiating because it is believed that this is the best way to protect America's basic national interest in an open, efficient, neutral and secure Canal."

Comment: As for having an "open, efficient, neutral and secure Canal" that is precisely what now exists. How surrender of U.S. sovereignty could help is beyond comprehension to anyone who is familiar with the burden of responsibility in the maintenance, operation, sanitation and protection of the canal. The new treaty will only result in extending Panamanian instabilities to the lock walls of the canal with enormous potentials for mischief.

18. The White House Memo states (p. 6) that:

> "The canal is important to the United States, though less than in earlier years, and we believe a new treaty with arrangements more acceptable to Panama will be more protective of the Canal than the present treaty, which is outmoded and a source of hostility."

Comment: Since World War II, the Panama Canal has had as many as 15,000 transits annually, which is much higher than pre-World War II traffic levels. Since that World War, the United States has fought two other wars - Korea and Viet Nam. Distinguished former Chiefs of Naval Operations have stated in a letter to the President that the canal is more important than ever before. (Congressional Record, June 30, 1977, pp. H6764, H6771 and S.11344.)

The assertion that surrender of U.S. sovereignty over the Canal Zone is the best way to protect the canal is difficult to understand. Such surrender would not enhance canal security but expose the canal to far greater hazards than under present treaty provisions. No wonder that Latin American leaders are reluctant to support the United States publicly when its own State Department does not.

19. The White House Memo states (p. 6) that:

> "The United States has all the rights, power and authority to conduct its activities in the Zone, 'as if it were sovereign,' not as the sovereign."

Comment: Article III of the 1903 Treaty grants to the United States "all the rights, power and authority within the zone... which the United States would possess and exercise if it were sovereign... to the entire exclusion of the exercise by the Republic of Canada of any such sovereign rights, power or authority."

Here again is the rewriting of an historical document by means of the insertion of the word "as" in the White House release before the word "if" to make it read "as if" - which of course creates an entirely different meaning.

Articles II and III of the treaty give the United States supreme power in the Canal Zone and this is sovereignty.

20. The White House Memo states (p. 7) that:

"Q. Militarily, does the canal have an important strategic role?"

"A. Not since the United States built aircraft carriers that are too big to go through the canal. However, it is still an important defense asset to the United States because it does facilitate the movement of military supplies."

Comment: The United States does not have a two-ocean navy. Its naval forces have been reduced to pre-World War II levels with less than 500 vessels of all types, only 13 of which are the large aircraft carriers. All other vessels can transit.

As to its military value, recent Commanders-in-Chief, Pacific, have stated that the Korean and Viet Nam Wars could not have been effectively conducted without U.S. control and use of its canal.

Placing the canal under Panamanian sovereignty would endanger the security of transit and have the effect of requiring far larger naval forces at tremendous cost.

21. The White House Memo states (p. 8) that:

"Q. Why is the canal's strategic importance now diminished?"

"A. Because larger aircraft carriers cannot move through it and submarines would have to surface during transit. Also, the canal is vulnerable to attack. Military officials generally agree that it would be extremely difficult to prevent canal closure by an air attack or by skilled sabotage."

Comment: Only 13 large aircraft carriers of less than 500 vessels cannot transit. As to submarines they have to surface when entering U.S. harbors and inland waterways. The statement that they would have to surface during transit of the canal is too absurd to merit consideration.

As to the use of the word "strategic," this term means one thing only and that is "advantageous geographical location." Since more vessels serving more people now transit than ever, the canal is more "strategic" than it was before World War II and no semantic twists can alter this fact.

All major transportation facilities are vulnerable. The Panama Canal was successfully protected during World Wars I and II, the Korean and Viet Nam Wars, the Cuban missile crisis and the 1964 attempted mob invasion of the Canal Zone. Our armed forces on the Isthmus are prepared and able to protect it again.

22. The White House Memo states (p. 8) that:

> "Under the proposed terms of a new treaty now being discussed, the United States would in effect have until the year 2000 to train Panama in operations of the canal."

Comment: Where could Panama find the human and material resources to operate the canal? They do not exist in Panama, which would have to call upon the U.S. taxpayers to pay the cost of this training and on other countries for assistance.

The problem of maintenance alone is highly technical and requires enormous resources far beyond the capability of Panama.

23. The White House Memo states (p. 9) that:

> "Under the new treaty we clearly would have the right to defend the canal against military actions directed against the canal. Also, we intend to have adequate assurances that the canal always will be open to the ships of all nations..."

Comment: Defense of the canal under full sovereignty is far different from defense under treaty provisions and no amount of sophistry can alter this basic fact. What would "adequate assurances" by Panama mean? Nothing.

24. The White House Memo states (p. 9) that:

> "Panama's current government has been in power since 1968 and shows considerable stability."

Comment: Panama has the stability of the police state. As always, there are elements in Panama ready to overthrow the present government, which is in debt to certain U.S. and other banks to the extent of some $2.77 billion.

Panama has also signed on July 19, 1977, an economic pact with the U.S.S.R. which may be an opening wedge for Soviet use of Old France Field in the Canal Zone as a part of the Colon Free Zone. Would this not be a beachhead inside the Canal Zone for the further advance of Caribbean Communism?

PANAMA CANAL TREATY (DISPOSITION OF UNITED STATES TERRITORY)

THURSDAY, OCTOBER 13, 1977

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:10 a.m., in room 1318, Dirksen Senate Office Building, Hon. James B. Allen of Alabama (chairman of the subcommittee) presiding.

Also present: Senator Scott of Virginia.

Staff present: Quentin Crommelin, chief counsel and staff director; Dr. James McClellan, professional staff (minority); Paul Guller, editorial director; and Melinda Campbell, chief clerk.

OPENING STATEMENT OF CHAIRMAN ALLEN

Senator ALLEN. The committee will please come to order.

This is the fourth hearing that the Subcommittee on Separation of Powers of the Judiciary Committee has held on the question of the Panama Canal Treaties.

The main thrust of the committee's inquiry has been to determine whether article IV, section 3, paragraph 2 of the Constitution should be applicable to the Panama Canal Treaties inasmuch as they do make disposition of property belonging to the United States.

This section of article IV of the Constitution gives Congress the power to dispose of and to make all the needful rules and regulations respecting the territory or property of the United States. The power granted is exclusive, so the investigation of that power has constituted the main thrust of the committee hearings.

At the same time, we have felt it appropriate for the committee to study and to report upon the advisability of ratifying the proposed treaties from the standpoint of our national security and of our national economic interest.

We have had a series of witnesses to express their views on the constitutional issues involved. We have had numerous witnesses who have given their views on the advisability of entering into these treaties—whether the Senate should give its advice and consent to the treaties.

This morning our witness will be presented in a moment by the distinguished Senator from Virginia who is a member of the subcommittee, Senator Scott. This morning we will have before the committee Senator A. Joseph Canada, Jr., a member of the Virginia General Assembly.

In addition to the constitutional question involved I understand that Senator Canada does wish to comment on the adverse economic impact that Senate consent to these treaties would have on the economy of the State of Virginia. Necessarily then adverse effects would occur in the economy of the entire Nation.

So, we are delighted to have Senator Canada here before the committee. We look forward to hearing his testimony.

At this time I will call on Senator Scott of Virginia, at whose suggestion this hearing is being held, to present Senator Canada.

Senator SCOTT. As you know Virginia is one of our closest States. The people of Virginia are very much interested in commerce. We have large shipyards within Virginia, and we are especially pleased that one of our State senators from the Tidewater of Virginia, Senator Joe Canada of Virginia Beach who has twice been elected to the Senate from Virginia, can come here and express his views not only with regard to the proposed Panama Canal Treaties generally but the effect of such treaties or denial of access to this vital artery of commerce would have on our State and on the Nation.

As you may know, Senator Canada is a candidate for the lieutenant governorship of Virginia and I believe this will be an issue that will be involved in the campaign. The citizens of Virginia will determine whether or not it is an issue that should be involved in the campaign.

Senator Canada is well able to speak for himself, so I present to you Senator Joe Canada of Virginia.

Senator ALLEN. I might say, Senator Scott, that I had not mentioned the fact that Senator Canada is a candidate. I want to make clear that the committee will be glad to hear from any citizen of Virginia who might also be engaged in politics even if he is in the same race.

The committee is seeking views of representative citizens and a hearing on this issue would be available to any representative citizen of Virginia or any State whether he be a candidate or not.

Senator SCOTT. Mr. Chairman, I would be glad to present to the committee any interested person from Virginia of either political party.

Senator ALLEN. You may proceed.

STATEMENT OF HON. A. JOSEPH CANADA, SENATOR OF THE SENATE OF THE STATE OF VIRGINIA

Senator CANADA. Thank you very much, Mr. Chairman and distinguished members of the Subcommittee on Separation of Powers. I would like to thank very much Senator Scott for asking me to come here today.

I am grateful for this opportunity to speak to you today about a matter of great economic significance to the citizens of the United States and in particular to the citizens of the Commonwealth of Virginia—the ratification of the Panama Canal Treaties. The treaties have become a major issue to the people of the State of Virginia. My purpose in coming here today is to alert you and the Members of the U.S. Senate to the fact that these treaties would seriously injure the economy of Virginia if they are approved.

My office has been in close consultation with the major government agencies and businesses that would be affected by the ratification of the treaties as well as various business and labor leaders throughout the Old Dominion. These include the Virginia Port Authority, the Association of American Railroads, the Virginia Coal Association, Maritime Terminals, Inc., and the Norfolk & Western Railroad. The information gathered from these sources leaves no doubt in my mind that treaty ratification could have a strongly detrimental economic impact on the Commonwealth of Virginia, and, I am certain, on the entire country.

Let me also emphasize that the Panama Canal issue has been a matter of grave concern to the Virginians I have encountered in my travels across the State. Virginians, I am proud to say, have a long and honorable tradition as staunch defenders of America's freedom and security.

67 PERCENT OF VIRGINIANS OPPOSE TREATIES

No better examples of this exist than Virginia's two distinguished members of the U.S. Senate, William L. Scott and Harry F. Byrd, Jr. In line with this tradition is the fact that the subject of the canal treaties is up front on the minds of many of our voters, both for economic and national security reasons. In fact, a very recent poll shows that 67 percent of Virginia's voters are opposed to the ratification of the Panama Canal Treaties.

One of the principal concerns of Virginians regarding treaty ratification is the grave impact ratification would have on Virginia's economy. There are three major industry areas that would be affected by ratification—shipping in the Hampton Roads ports, coal mining in the southwest, and freight railroads that transport the coal from the mines to the docks. Obviously a change for the worse in the economic status of one or more of these industries could produce a rippling effect on the State's entire economy.

One, if we are denied access; and, two, if the toll would go up. If we are denied access we know that the ships would have to travel an additional 8,000 miles which would take approximately 30 days. The average size ship costs approximately $12,000 a day to sail it. If you multiply this times 30 which is extra time that would be involved, it amounts to $360,000 per shipment.

The Panamanian Government is near bankruptcy and needs money desperately. I know that this year 39 percent of their budget was for interest payments on their debts.

While the tolls are going up—the news media has indicated it will go up according to the recent discussions about 25 or 30 percent. Gov. Harold Crawford of the Canal Zone testified to this committee that the plans are made to have the tolls go up. The cost will be passed on to the ports and to the people of Virginia.

Tolls increases since 1974 will be 49.5 percent under the existing agreements. The Panama Canal Company has indicated that the tolls will go up as much as 46 percent on top of the 49.5 percent that they will go up anyway. This would amount to almost a 100-percent increase since 1974.

According to a State Department document entitled "Environmental Impact on the New Panama Canal Treaties" dated August 1977, adverse environmental effects cannot be avoided. The 50-percent increase in tolls would result in unavoidable effects and loss from unemployment. This comes from the Carter administration's own State Department.

We have approximately $8 billion worth of cargo which goes through the Port of Hampton Roads each year. Of that amount, $2 billion goes through the Panama Canal or approximately 25 percent. There are approximately 356,000 jobs that depend on our ports; 114,000 depend on cargo transportation. So 25,000 jobs depend on the canal access at reasonable toll rates.

Each job represents not only one person but a family, sometimes one or two or many children. So the entire Tidewater area would be adversely affected if these treaties are ratified.

Let's take the coal mining industry, for example, for a moment. My grandfather was a coal miner for 34 years. So I think I know something about coal mining. There are approximately 17,000 coal miners in our State. Seventy percent of all of the cargo that goes through the Port of Hampton Roads is coal. In 1976, to show you how delicate the balance in world trade, Japan which is the chief recipient of our coal exports found because of freight rates according to the Virginia Port Authority, that they could buy coal cheaper at another place. We had a 9-percent drop in metallurgical coal in Virginia in 1976. This drop was projected according to port authority for 1977 to go to 18 percent.

If the tolls go up an additional 30 or 35 percent it will have a disastrous effect on the coal industry. It would have the ripple effect of hurting the railroad industry and many other supplemental jobs that are related.

The entire southwest depends on coal mining. If the canal were closed it would plunge the southwest and probably most of our State into a deep depression.

The railroad industry would be vitally affected. There are approximately 15,000 railroad workers in Virginia; 10,000 of them work for the Norfolk & Western Railroad whose primary activity is to transport coal. This is not political rhetoric. These are facts.

This is not something new that we have just been talking about.

On May 26, 1976, the Virginia Port Authority Board of Commissioners meeting in Norfolk passed a resolution expressing their concern over the future of the Panama Canal and the new proposed toll increases at that time. They indicated that we had to protect the canal in order to protect shipping. They requested that the proposed toll rate not be enacted because they felt as though it would have an adverse effect on the economy and on the economy of the entire State.

On August 4 of this year the Virginia Port Authority Executive Committee drafted a resolution to submit to the board of directors expressing strong concern over the need to protect the continued use of the Panama Canal for free world shipping.

The Virginia General Assembly has thought about this question and on February 13, 1974, over 3½ years ago, I, along with some other senators in the Virginia General Assembly, introduced Senate Joint Resolution 51 which was adopted by the Virginia General Assembly with overwhelming bipartisan support. This expressed our concern over any encroachments upon the sovereignty of the Panama Canal. We felt as though the treaty of 1903 should be kept intact and no modifications should be made.

I have attached a copy of the resolutions that are mentioned in my statement. I ask they be included, Mr. Chairman, in the record.

[The material follows:]

RESOLUTION 76-9

A RESOLUTION EXPRESSING CONCERN OVER THE FUTURE OF THE PANAMA CANAL AND ANY NEW PROPOSED TOLLS AT THE PANAMA CANAL

WHEREAS, much attention has been given to efforts attributed to the United States' Department of State to renegotiate the position of the United States with respect to the Panama Canal; and

WHEREAS, the Panama Canal is one of the Major maritime gateways of the world serving some 14,000 ships a year of which some 8,000 visit and serve United States' ports, with well over 500 of these ships carrying some 12,400,000 tons of cargo from and to Virginia's ports via the Panama Canal in 1975; and

WHEREAS, the Panama Canal permits the United States to maintain its naval responsibilities with fewer ships; and

WHEREAS, the Congress should establish the policy necessary to guide any renegotiations of the Treaty with Panama; and

WHEREAS, the continued availability of the Canal to the United States and its allies at tolls competitive with alternate methods of cargo movement is essential.

NOW THEREFORE BE IT RESOLVED, by the Board of Commissioners of the Virginia Port Authority in regular meeting assembled at Norfolk, Virginia, this 26th day of May, 1976, as follows:

1. The President and the Congress of the United States are respectfully urged to protect the use of the Panama Canal to free world shipping far into the future.

2. The Virginia Port Authority additionally requests that recently proposed toll increases be denied as further increases in tolls for passage through the Panama Canal will create unnatural diversions of maritime cargo

to the detriment of the ports of the Commonwealth of Virginia and will impede greatly this nation's and the free world's ability to compete in world shipping.

Edward R. English

Edward R. English, Chairman

ATTEST:

Debbie Miley

Debbie Miley, Deputy Clerk

"VIRGINIAN PILOT"

Oct. 5, 1977

Port Panel Registers Concern on Canal Use

HARRISONBURG (AP)—The Virginia Port Authority's Executive Committee drafted a resolution Tuesday expressing what a spokesman called "strong concern over the need to protect the continued use of the Panama Canal by Free World shipping."

The committee spokesman, Dick Culbreath, said the resolution will be submitted to the VPA Board of Commissioners at its Oct. 12 meeting in Richmond.

A copy also will be sent to members of Virginia's congressional delegation to inform them, Culbreath said, that reasonable toll rates must be maintained so Virginia ports may stay competitive with ports on the West Coast.

Last year, Culbreath said, Virginia ports handled 10.7 million tons of cargo valued at $1.6 billion, which passed through the Panama Canal.

Virginia's industries, agricultural products, and coal mines contributed about 2.1 million tons of cargo valued at $320 million that used the canal, he said.

Higher rates for cargo passing through the canal, Culbreath said, would directly affect 22,500 port dependents and port-related jobs in the state, and additional losses could be felt in the $100 million spent annually to handle the cargo and the $6 million generated in direct taxes to the state.

LD2495

SENATE JOINT RESOLUTION NO. 51

Offered February 13, 1974

Expressing the sense of the General Assembly of Virginia relative to the Hay-Bunau-Varilla Treaty of 1903.

Patrons—Messrs. Barnes, Campbell, Manns, Willey, Hopkins, Aldhizer, Buchanan, Canada, Burruss, Truban, Anderson, Thornton, Goode, Townsend, Warren, Parkerson and Michael

Referred to the Committee on Rules

Whereas, in nineteen hundred and three, the United States of America was granted sovereignty over the Panama Canal Zone in perpetuity; and

Whereas, the Panama Canal is essential to the defense and national security of the United States of America; and

Whereas, the Panama Canal is of vital importance to the economy and interoceanic commerce of the United States of America and the remainder of the free world; and

Whereas, valuable exports from Virginia go through the Panama Canal to distant reaches of the globe; and

Whereas, under the sovereign control of the United States of America, the Panama Canal has provided uninterrupted peacetime transit to all nations; and

Whereas, the traditionally unstable nature of Panamanian politics and government poses an implicit threat to the security of the interests of the United States of America served by the Panama Canal; and

Whereas, the Republic of Panama possesses neither the technical and managerial expertise to effectively operate and maintain the Canal nor the capability to meet the growing demands placed upon the Canal; and

Whereas, the Canal represents a five billion dollar investment on the part of the people of the United States of America; now, therefore, be it

Resolved by the Senate, the House of Delegates concurring, That the General Assembly of Virginia requests that the Congress of the United States reject any encroachment upon the sovereignty of the United States of America over the Panama Canal and insist that the terms of the Hay-Bunau-Varilla Treaty of 1903 as subsequently amended be adhered to and retained; and

Be it further resolved, That the Clerk of the Senate send copies of this resolution to Richard M. Nixon, President of the United States; Gerald R. Ford, Vice President of the United States; Henry A. Kissinger, Secretary of State; Carl Albert, Speaker of the House; J. William Fulbright, Chairman, Senate Foreign Relations Committee; and to each member of the Virginia Delegation to the Congress of the United States.

Official Use by Clerks

Agreed to By The Senate	**Agreed to By The House of Delegates**
with without amendment	with without amendment
Date:	Date: ....
.... Clerk of the Senate	.... Clerk of the House of Delegates

Senator CANADA. I would like to express my strong opposition to the ratification of these treaties. It would have a disastrous effect on the economy of Virginia. We bought the land. We paid for it. We bought the canal with a lot of American lives. Now under the proposed treaties they want us to give it away and to give them approximately $60 million a year to take it.

Mr. Chairman and members of the committee, it does not make sense to me.

But in addition to that we are talking about a lot of jobs in Virginia. One of the most important things that I can do as a State senator is to try to protect the jobs of the people in my State. We're not only talking about jobs today, but we're talking about jobs for our children and grandchildren. We certainly do not want to do anything to hamper their future.

The proposed treaty ratification would have a disastrous effect on our State and on the jobs of Virginia and many thousands of people involved.

The coal miners who are of vital concern to me, and others, would be tremendously affected because most coal miners, especially if they have some age on them, are trained to be coal miners and it would take a lot of training to find new employment for them, plus the fact that the whole southwestern part of Virginia depends on coal and coal miners.

We would have a real depression on our hands. I hope that this will be taken into consideration by this committee and by the entire Senate.

So much is said about our having to give into the pressures which are being alleged that exist from the Panamanian Government. If you will recall back in 1967 and 1968 under the Johnson administration the same arguments were put forth. At that time there was a proposed treaty, it's my understanding, that President Johnson was going to work on. But because of the outcry of the public sentiment against this, nothing happened. I hope we will not yield to the pressure.

I think that we have seen people lose a lot of confidence in our Government. They seem to think that we give too much away to foreign countries.

Here is a canal that we built. Here is a canal that we paid for. I think we paid for it four times probably. Now they want us to give it away and give them $60 million a year to take it, and we know the tolls are going up. So it would have not only the effect of giving away an asset, a valuable asset of this country. We are giving them money to take it and then we would say "OK, we know the tolls are going to go up." That will hurt us too. Jobs are affected also.

I hope my testimony will be of some value to you and the Members of the Senate. I would like to say once again that I am very grateful on behalf of the people of the great Commonwealth of Virginia for having the opportunity to appear before this distinguished subcommittee. I shall be happy to respond to any questions that you might have. I hope that my remarks will be made part of the record.

Senator ALLEN. Yes; your entire statement will be made a part of the record.

[Material follows:]

PANAMA CANAL TREATY
(DISPOSITION OF UNITED STATES TERRITORY)

HEARING
BEFORE THE
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
FIRST SESSION

STATEMENT OF VIRGINIA STATE SENATOR A. JOSEPH CANADA:

The Potential Impact of Ratification of the Panama Canal Treaties on the Economy and People of the Commonwealth of Virginia

October 13, 1977

Mr. Chairman, distinguished members of the Subcommittee on Separation of Powers:

I am grateful for this opportunity to speak to you today about a matter of great economic significance to the citizens of the United States and in particular, the citizens of the Commonwealth of Virginia - the ratification of the Panama Canal Treaties. The Treaties have become a major issue to the people of the State of Virginia. My purpose in coming here today is to alert you and the Members of the U. S. Senate to the fact that these treaties would seriously injure the economy of Virginia if they are approved.

My office has been in close consultation with the major government agencies and businesses that would be affected by the ratification of the treaties as well as various business and labor leaders throughout the Old Dominion. These include the Virginia Port Authority, the Association of American Railroads, the Virginia Coal Association, Maritime Terminals, Inc., and the Norfolk and Western Railroad. The information gathered from these sources leaves no doubt in my mind that treaty ratification could have a strongly detrimental economic impact on the Commonwealth of Virginia, and I am certain, on the entire country.

Let me also emphasize that the Panama Canal issue has been a matter of grave concern to the Virginians I have encountered in my travels across the state. Virginians, I am proud to say, have a long and honorable tradition as staunch defenders of America's freedom and security.

No better examples of this exist than Virginia's two distinguished members of the United States Senate, William L. Scott and Harry F. Byrd, Jr. In line with this tradition, is the fact that the subject of the Canal Treaties is up front on the minds of many of our voters, both for economic and national security reasons. In fact, a very recent poll shows that 67% of Virginia's voters are opposed to the ratification of the Panama Canal Treaties.

One of the principal concerns of Virginians regarding treaty ratification is the grave impact ratification would have on Virginia's economy. There are three major industry areas that would be affected by ratification- shipping in the Hampton Roads ports, coal mining in the southwest, and freight railroads that transport the coal from the mines to the docks. Obviously a change for the worse in the economic status of one or more of these industries could produce a rippling effect on the state's entire economy.

It is important to realize exactly what is meant by treaty ratification. The worst possible consequence of giving the Panamanian government control over the Canal would be the denial of access to American shipping. The alternative in this case is almost unthinkable, when one realizes its consequences. The difference between going through the Canal and going around the South American Cape is approximately

8000 miles or 30 days sailing time. For an average size ship, all inclusive sailing costs are $12,000 per day. Multiplying by 30 we find that the extra trip would cost a vessel travelling from the east coast of the United States to an Asian port, for example, $360,000 more than the present cost of the trip through the Canal.

While the closing of the Canal to American shipping, or even a temporary interruption, is a very real possibility from the moment our Canal is turned over to the Panamanian dictator, Omar Torrijos, the immediate danger is a radical increase in the tolls. There is no doubt in anyone's mind that such an increase is almost a certainty. We know the Panamanian government is near bankruptcy and needs the money. The figures "25 to 30%" have appeared quite frequently in the news media as the likely size of the increase, and Governor Harold Parfitt of the Canal Zone has already testified before this Subcommittee that the Panamanians plan to increase the toll. The cost of this increase will be passed on to the ports of Virginia and ultimately to the people of my state.

However, the most persuasive piece of evidence in the area of toll increases is a document produced by President Carter's own State Department in August of this year. It is entitled, "ENVIRONMENTAL IMPACT STATEMENT FOR THE NEW PANAMA CANAL TREATY." Under a section called "Proposed increase in rates of tolls for use of the Panama Canal" we find, on pages 2 and 3, the following paragraph:

"A. Description of Proposed Action

Pursuant to sections 411 and 412 of Title 2 of the Canal Zone Code, the Panama Canal Company is proposing an across-the-board increase of approximately 19.5% in the rates of tolls for use of the Panama Canal. Specifically, the following increases are proposed in the rates of tolls:

TOLL RATES

Per Panama Canal Net Ton	Present	Proposed	Amount of Increase
Laden	$1.08	$1.29	$ .21
Ballast	.86	1.03	.17
Per Displacement ton	.60	.72	.12

This increase would follow an across-the_board increase of 19.7% effective July 8, 1974, and changes in the rules of measurement effective March 23, 1976, resulting in an estimated average increase of about 4.5% in tolls paid by vessels using the Canal. The total effect of the three rulemaking actions, including the present proposal is an increase in tolls payments of about 49.5%.

It is important to realize that this 49.5% toll increase is occurring under the present conditions; it is not a projection of the effects of the new treaties. However, the Panama Canal Company has said, in reference to additional toll increases as a result of the new treaties, that "....estimates as high as 46% could conceivably be correct." This would place the total increase in tolls at almost 100% since 1974.

Any significant toll increase will have the effect of making East Coast cargo less attractive to ports west of North America due to the increased cost to the consumers. Any doubt that this will directly result in unemployment is erased by another section of the State Department's study. Under the title of "Adverse environmental effects that cannot be avoided " we find the following:

> "A 50% increase in Panama Canal tolls would result in the following unavoidable environmental effects; .... An unquantifiable loss of employment and employment benefits in U. S. Atlantic ports.

Let me now explain in what ways these toll increases would bring about a severe impact on Virginia's economy, especially as they would affect unemployment figures in our state.

First, considering the Hampton Roads shipping industry, we find that in 1976, $8 billion worth of foreign trade was handled by Virginia ports. Of that, approximately 25% or $2 billion worth, passed through the Panama Canal. In other words, one-fourth of all Virginia's foreign trade business is critically dependent upon reasonably priced access to the Canal.

Further, we find that approximately 356,000 jobs in Virginia depend on Port and Harbor-related activity. Of that figure, 242,000 are supported by the Navy and the shipyard industry and therefore do not relate directly to the transport of cargo tonnage. That leaves 114,000 jobs that depend on harbor transport, with slightly under one-fourth or about 25,000 Virginians dependent upon access to the Panama Canal at reasonable toll rates. Of all the potential effects of treaty ratification, this one is of the greatest concern to me as a citizen of the State of Virginia. The fact that 25,000 Virginians could lose their jobs is, by itself, a good reason for my inalterable opposition to the ratification of the treaties.

Before considering the other industry areas that will be affected, a secondary effect of these treaties should be examined. This is the residual effect on the economy of the entire Tidewater area if a massive increase in unemployment occurs as the result of increased tolls leading to greatly reduced shipping traffic. For each job lost the effect is direct on an average family of 2 to 3 people. A rise in unemployment in the Tidewater area of the proportions involved could cripple the prosperity of a major metropolitan center that is currently second in size in Virginia and expected to become number one by 1980.

Turning our attention from Tidewater to the Southwest section of Virginia, we find that approximately 17,000 Virginians depend on the coal mining industry for their livelihood. The importance of the Panama Canal to these people is reflected in the fact that almost 70% of the cargo handled by Virginia ports is coal. Last year Virginia coal exports dropped by about 4 million tons, or 9%, because Japan, the largest buyer of U. S. metallurgical coal, found sources with cheaper freight rates. There is a projected further drop of 18% for 1977 for the same reason. Virginia's coal, because of its high freight rates, is increasingly becoming noncompetitive on the world market. These drops of 9 and 18% in the last two years have occured in spite of the fact we have reasonably priced access to the Panama Canal. The predicted toll increases of 25 to 30% could virtually kill the saleability of Virginia coal to all customers west of the Canal. The tremendous drop in production would lead to the layoff of thousands of miners in southwest Virginia. Because this area of the state depends entirely on the coal industry to support its economy, it could conceivably be plunged into a state of depression as a result. A further statewide effect would be the dramatic increase in the price of coal to the majority of Virginians who depend on that fuel to heat their homes.

The third major industry that would be affected by ratification of the treaties is Virginia's railroads. Approximately 15,000 Virginians are employed by the railroad industry. Of that figure, 10,000 work for the Norfolk and Western Railroad, whose primary activity is the transport of coal from the mines in the southwest to the docks at Hampton Roads. A drop in coal exports and the resultant drops in production and transportation would seriously endanger the welfare of thousands of railroad workers and their families across the entire southside Virginia region. Also affected would be those people who work for the companies who manufacture and repair railroad equipment.

By way of conclusion,it is important to note that concern over the status of the Panama Canal is neither new nor election year rhetoric in Virginia. On May 26, 1976, the Virginia Port Authority Board of Commissioners, meeting in Norfolk, adopted Resolution 76-9 entitled, "A Resolution Expressing Concern Over the Future of the Panama Canal and Any New Proposed Tolls At the Panama Canal." The resolution called for two actions. First, it asked the President and the Congress "...to protect the use of the Panama Canal to free world shipping far into the future." Second, it requested "...that recently proposed toll increases be denied as further increases in tolls for passage through the Panama Canal will create unnatural diversions of maritime cargo to the detriment of the ports of the Commonwealth of Virginia and will impede greatly this nation's and the free world's ability to compete in world shipping."

On October 4 of this year the Virginia Port Authority Executive Committee drafted a resolution which, according to one of its spokesmen, expressed "strong concern over the need to protect the continued use of the Panama Canal by Free World shipping." The draft will be submitted to the VPA Board of Commissioners for their approval later in the month.

On February 13, 1974, over three and one-half years ago, I co-sponsored with 16 fellow legislators of both parties, Senate Joint Resolution No. 51 which was adopted by the Virginia General Assembly with overwhelming by-partisan support. It was described in title as "Expressing the sense of the General Assembly of Virginia relative to the Hay-Bunau-Varilla Treaty of 1903. " The resolution called for the "Congress of the United States (to) reject any encroachment upon the sovereignty of the United States of America over the Panama Canal and insist that the terms of the Hay-Bunau-Varilla Treaty as subsequently amended be adhered to and retained..."

I have attached copies of these resolutions to my statement, and ask that they be included in the record.

For over sixty years the United States has efficiently and successfully operated the Panama Canal. Prior to its opening in 1914 we paid for the land four times; we build the Canal losing thousands of American lives in the process; and we signed a treaty with Panama in 1903 under which we have been operating and defending it. Now two treaties have been signed which, if ratified by the United States Senate, will eventually give Panama total control over and ownership of the Canal. Panama is ruled by a Marxist dictator who seized power by force and who is very closely allied to Cuban Premier Fidel Castro. His government is unstable and his country's economy is in desperate straits, owing American banks almost $2 billion.

In view of these facts, the primary justification offered by many for giving up the Canal seems to be the threat of violence in Panama as a reaction to continued so-called "Yankee Imperialism." I do not advocate the United States' adopting a policy of bending under pressure of such threats. I am unqualiedly and unalterably opposed to the ratification of any treaty that would provide for the give-away of the American Canal in Panama. Additionally, the treaties call for the payment of $60 million dollars annually to the Panamanian government for the right to use a Canal that belongs to the United States.

Once again, I am grateful, on behalf of the people of the great Commonwealth of Virginia for having the opportunity to appear before this distinguished subcommittee. I shall be happy to respond to any questions that you may have.

Senator ALLEN. Senator Scott, would you please begin the questioning of this witness?

Senator SCOTT. Yes. Thank you, Mr. Chairman.

I saw a cartoon a couple of days ago. Apparently it was intended to be humorous. It indicated that we had purchased the Canal Zone, and we had constructed the canal. It posed a question of how much Panama was willing to pay us if they wanted the canal.

Actually even though that was in the cartoon, there may be some merit in the suggestion. If we have property which belongs to us and that is valuable property and if some other country wants it, it does seem reasonable that some purchase price would be paid.

LARGE PERCENTAGE OF MAIL IN OPPOSITION TO TREATIES

Senator Canada, we welcome you again to the committee. I would say to you that my mail is now running about 96 percent in opposition to the proposed treaties, with only about 4 percent of the people of Virginia who have contacted me who favor the ratification.

You speak of some of the port facilities down in the Hampton Roads area and in the Tidewater area. Is there any substantial amount of coal from Virginia and West Virginia and from other States that come into these facilities in Tidewater for transmittal? Do you know whether any of this does pass through the Panama Canal?

Senator CANADA. Yes, sir. Senator Scott, according to the Virginia Port Authority and other sources that we have talked to, $8 billion worth of cargo passes through the port of Hampton Roads every year. Of that amount, 70 percent of it is coal. Of the entire amount that passes through, 25 percent goes through the Panama Canal. So we are talking about a significant amount of coal that does go through the canal.

Senator SCOTT. Do you have information as to the extent or would you care to share with the committee any information with regard to the extent of shipbuilding activities in Virginia, both the military shipbuilding and civilian shipbuilding, particularly in the Tidewater area that you represent? Would you share that with us?

Senator CANADA. Yes, sir. There are approximately 356,000 jobs in the Tidewater area related to port- and harbor-related activities. Approximately 242,000 are supported by the Navy and the shipyard industry. Therefore, that would be vitally affected as well. But that leaves 114,000 jobs that depend on harbor transportation. So we are talking about a lot of jobs that could be affected.

Senator SCOTT. We have the Newport News Shipyard which is a civilian shipyard that constructs both military and civilian ships located in the general Tidewater area at Newport News. It is reported to be the largest civilian shipyard in the world. Is that accurate? How many people do they employ, roughly if you know?

Senator CANADA. I am not sure of the exact amount, but it is one of the largest shipyards.

All the people would be affected in that industry and in the Navy and so forth and civilians as well. There are 242,000 potential people affected.

Senator SCOTT. Then we also have the Norfolk Shipyard at Portsmouth, Va., that is a military shipyard; is that correct?

Senator Canada. That is correct, yes, sir.

Senator Scott. Do you have any idea as to the number of military personnel that we have stationed in Virginia that would be interested in this canal—in Tidewater and elsewhere in Virginia?

Senator Canada. It would be in the thousands. So many military people in the Tidewater area have been in touch with me. They are vitally concerned over this treaty and they are very much against its ratification. It would have a tremendous effect on them.

Senator Scott. With regard to coal and other facilities that pass through the Hampton Roads area, we have two railroads the C. & O. and the N. & W. Are those the principal railroads that are bringing material into the area?

Senator Canada. Yes, they are. The N. & W. Railroad, for example, employs 10,000 people. They would be vitally affected and they are vitally concerned over the ratification of these treaties. They are very much against it.

Senator Scott. We have spoken of coal. Are there other materials that do go through the Tidewater ports and the Hampton Roads ports other than coal that the closing of the canal or the jeopardizing of the canal would have some effect upon?

Senator Canada. Yes, sir. There are many industries that would be affected. I just mentioned the major ones. Let's take for example the furniture industry in Martinsville and other parts of our State.

A lot of the furniture that goes overseas goes through the canal. This would have an impact on them.

Also we have agriculture exports which would be vitally affected because of the balance being so delicate in world trade.

Senator Scott. Are not there some major container facilities for shipment overseas located also in the Tidewater area? Would they not also be affected?

Senator Canada. Yes, sir, they would be adversely affected.

Senator Scott. You speak of $8 billion worth of foreign trade being handled in the Hampton Roads industry in 1976. Twenty-five percent or $2 billion worth is there. I am looking at page 5 of your prepared statement. If there was some adverse effect due to the closing of this canal, that would have an overall effect upon the economy of Virginia; would it not?

Senator Canada. It certainly would. As I mentioned, the coal industry would be most affected and in my opinion and the opinion of others this might lead to a depression in that area.

Senator Scott. Again, I am glad that you were able to fit your testimony into your schedule and that you have come here and you have shared your thoughts with us. I do once again extend my welcome to you.

Thank you, Mr. Chairman.

Senator Allen. Thank you, Senator Scott.

Senator Canada, I do wish to commend you for the concern that you have shown for the economy of your State and for the jobs of the people of your State which would be adversely affected by the approval of these treaties.

I appreciate your calling to the committee's attention the adverse impact that the approval of these treaties will have on the economy of your State. It would seem likely then that other coastal States would be adversely affected also. Would that not be the case? The predictable adverse economic effect is not peculiar to the State of Virginia is it?

Senator CANADA. Mr. Chairman, I think you are exactly right. But I think the State of Virginia would feel the impact much quicker and in a more devastating way than other States. Nevertheless, I think all the States of this great Nation would be vitally affected.

Just look at the oil, for example, that comes through the Alaska pipeline. It has to go through the Panama Canal to get on the eastern side.

Senator SCOTT. Mobile, Ala., might be adversely affected; wouldn't it?

Senator CANADA. It certainly would.

Senator ALLEN. Yes, obviously the economy of Alabama would be adversely affected. As a matter of fact, we had a witness from Mobile, Ala., up here at one of the other hearings. He was unable to stay to testify but he wanted to testify also. I assume his testimony would be somewhat like yours.

One of the newspaper articles which you inserted, Senator Canada, along with your testimony speaks of the resolution drafted by the Virginia Port Authority in opposition to the approval of these treaties. I am informed that on yesterday this resolution was adopted by the Virginia Port Authority. So, it seems that they too recognize the adverse impact that the approval of the treaties will have on their operation. Is that not the case?

Senator CANADA. Yes, it is, Mr. Chairman. I apologize for not having the resolution but we didn't have time to get a copy in order to submit it for the record.

Senator ALLEN. I understand one of the reasons given for the submission of these treaties, that is, the drafting of these treaties and their subsequent submission to the Senate, is that we should consider and consent to these treaties as part of a good neighbor policy. Do you feel that this is carrying good neighborliness a little bit too far?

Senator CANADA. Mr. Chairman, I certainly do. I believe from many of the things that I have read and from the people with whom I have talked not only do I think that way but many people in other parts of the world also think that way. I believe the people of this great Nation are very concerned over the continued giveaway of the funds of our taxpayers in a situation like this where we are giving up an asset of this country purchased at high cost in dollars and lives.

For example, my next door neighbor—let's say I bought a strip of land across the rear of his property and constructed a sidewalk, for example. Then so many years later he wants me to give that to him and to give him $1.000 to take it and then he will charge me a passage fee to walk up and down it. That does not make sense to me. I do not believe we are making any friends by doing this. We have a strong Nation and a good Nation. I do not think we should yield to any pressures that are put to us by pro-Communist leaning dictators. In any event, we don't know how long this current dictator will be in power. What will the next one be like?

In the news media they are talking about the treaties and the intervention aspect in that the treaties purportedly say that we have a right to intervene. This right exists because of some of the things that were said in secret, I suppose—I cannot find it in the treaties. But we do not know how long this dictator will be there. The life expectancy of a dictator in that particular country, if you look at their history, is not very long. We could have a new dictator next year. His name could be "Juan Giveaway" and he might wish to make a present of the Panama Canal to some other country, perhaps the Soviet Union. If that happens what would happen to this treaty? We would be in bad shape. I think that the people of this country are tired of giving things away. I think we have a strong country and we need to stand up on this particular issue.

PANAMA CANAL ISSUE MOST INTERESTING TOPIC

Senator **Allen**. That is a sound view it seems to me.

During the congressional recess in August and early September, I visited 37 Alabama counties. The topic of most interest apparently to the people that I saw—and I saw literally thousands of people in Alabama on a one-to-one basis—was the Panama Canal issue. Frequently I would have their concern expressed to me by saying, "well, we're not only going to give them the canal but we're going to pay them to take it."

Have you had that same view expressed to you in Virginia in your travels througout the State?

Senator **Canada**. Yes, sir, Mr. Chairman, I certainly have. I traveled my State from one end to the other. It is amazing how many people with whom I have talked who bring up the Panama Canal, and I have been impressed with the importance of this issue not only by private citizens but by other people who are themselves running for public office.

They say that the first issue that comes to mind from the person with whom they are talking is this canal issue. The people want to know why we should give it away and why we should give Panama money to take it. It doesn't make sense. It is against the best interests of our Nation, and the people know it is against our best interests.

Senator **Allen**. One way that the administration proposes to give them the money, of course, is to arrange for tremendous loans to them through some of the international financial institutions. It is, of course, highly doubtful that Panama will ever pay the loans back.

CANAL COMPANY DEBT TO TREASURY

But the canal is operated not by the U.S. Government but by the Government, you might say, through the Panama Canal Company.

The Panama Canal Company owes to the Treasury some $319 million. Apparently the Canal Company, having this big debt, is to be wiped out and the Panama Canal Commission would be set up with no debt on its books.

It would seem to me from studying the documents that the administration plans to wipe out the $319 million of indebtedness. That would seem to me to be somewhat like giving somebody equity in a house, let's say, without transferring the mortgage. In other words you would say that you have a mortgage on the house and you will give him the house free but you would say also that you didn't want him to assume the mortgage and that you would clear the mortgage for him before you turn it over to him. Most people, I would think, would be satisfied to get the house free even with a mortgage.

So here is a debt of $319 million that is going to be wiped out or rather that the people of the United States will be required to satisfy. I understand that $319 million is still the unrecovered balance of the original cost of the canal and of subsequent capital investment in it.

Do you think it is right that we wipe out this tremendous debt as we give the canal to Panama?

Senator CANADA. Mr. Chairman, I certainly do not. In essence we are making a gift of $319 million. I do not think it is right. I do not think the people of my State think it is right. I don't think the people of this Nation believe that it is right or just.

I just cannot understand the logic of that thinking. Maybe I am missing something but I do not understand the logic of the treaties in general terms of the giveaway. I think it is wrong. Something has got to be done to change and reject these disastrous provisions.

Senator ALLEN. I think you have put your finger right on the point that is directly involved and most concerns some Members of the Senate now. That is the manner in which these differences in interpretation or errors in the language of the treaty can be clarified or corrected.

You are pointing out that simply because the administration says that a particular provision gives us a particular right in their construction of the provision that that assertion alone would not be sufficient to protect our interest. As you say, if the government should change down there, then the successor government would not feel bound by these exchanges of letters or even to signed documents.

I believe that fact is going to be a big point when this matter comes before the Senate—whether these tremendous defects in the language of the treaties can be cured by an exchange of correspondence, whether they can be cured by a simple understanding added to the treaties by the Senate or by reservations added to the treaties, or whether they can be cured only by amendments.

It is my view—and I would like to get your opinion—that anything short of an amendment to the treaty would be an exercise in futility and wholly inadequate to correct these differing interpretations of the language of the treaty.

Do you feel that amendment is what it would take to clarify the misunderstandings?

Senator CANADA. Mr. Chairman, I agree with you. I think anything short of an amendment—and I am not an expert in international law by any means but I am a lawyer—you must have a simple and accurate contract between the parties, otherwise it is not enforceable. If you don't have a contract, you can have all the side agreements you want and you will still find it impossible to enforce. I think the principles applied on the local basis with respect to regular contracts will also apply to treaties. If the treaty is ambiguous or if it is subject to differences of opinion and it is not precisely written, then we will have real problems in trying to enforce it.

Senaator ALLEN. You speak of contracts. One of the first things I learned in a course on contracts that I took as a freshman at the University of Alabama Law School was that there has to be a meeting of the minds before you can have a valid contract. So obviously there is no meeting of the minds here because Torrijos says one thing and our negotiators say the opposite. So there is a difference of opinion.

They have worked 13 years on this language. It does seem that they could have come up with a little bit clearer language after working on it for 13 years. We hear a whole lot about high school graduates not being able to read. It looks like some of our high-priced negotiators have not been able to put into clear language just what has been agreed. I can't understand why not. Is it lack of education or were they afraid to set out before the public the bargain struck?

Senator SCOTT. If the Senator will yield, the distinguished chairman mentioned an elementary contract. That is that there had to be a meeting of the minds to have it be a valid contract. I would ask the chairman this. Would you also agree that in order to be a valid contract there has to be consideration and mutuality of contract from one party to the other party. You can have a gift without consideration, but you cannot have a valid contract. But where you have no consideration passing from Panama to the United States, would it not be more proper to call this treaty a gift rather than a contract? Panama is bound to nothing and simply takes all.

Senator ALLEN. There is certainly reason for agreeing with the logic of your statement.

Getting back to the matter of the amendments—and I think you are absolutely right, Senator Canada—there seem to be at least three stages in the manner of handling these obvious problems. The proponents of the treaties are going to try to get by with just as little in the way of clarification as they can. As a first stage then, possibly there might be an exchange of correspondence. But I do not believe the Senate will agree to that.

Going from that stage to a second stage, an understanding might be added to treaty but understandings would merely give our interpretation and would have no binding effect whatsoever on the other side. Understanding too would be unacceptable.

Finally as a third stage the proponents will suggest that a reservation could be added. A reservation would not take any additional negotiation, not a new treaty. It would merely be acquiesced in by the other side. Reservations also would have no true binding effect and cannot solve these problems.

Amendments, which I feel—and I am glad that you concur—would require the renegotiation and resubmission of the treaty, are the only acceptable solution. I believe that that is the route that the Senate ought to follow and will follow. We might deal with our right to defend the canal and our right to have priority for our ships—certainly our warships—transitting the canal. There is also the matter of our not being able to negotiate for 23 years with another nation for another canal and binding us to do nothing for that length of time. All of these things can be corrected by amendment only.

Once we amend it, as the Senate might see fit to do, then this amended document, while it would be void as a treaty, could serve as a guideline to our negotiators in the future to show what the Senate would accept. So, I agree with you that the matter should be handled by amendment.

What do you think of the provision in the treaty that we cannot, during the life of the treaty until the year 2,000, negotiate for another route with another country? Do you think that protects our country?

Senator CANADA. Mr. Chairman, I cannot understand why an negotiator after working 13 years would put something that ou rageous in there. It is against the best interest of our Nation. Shoul something happen in Panama we are prohibited under the treat without their consent from building a new waterway. It is certainl not in our best interest but only in the best interest of the recipient c the gift as Senator Scott pointed out.

Senator ALLEN. That is a fine comment and clearly accurate.

Senator Scott, any further questions?

Senator SCOTT. Mr. Chairman, I would like to make some brie comments.

Mr. Chairman, you referred to the debt that remains for the cor struction of the canal. As I understand it, we have had this canal i operation for almost 65 years. I believe it was completed around 191 We have been using it.

I have been told that the locks are still in almost as good conditio as they were at the time that they were installed. That is due to th maintenance, to the good maintenance which has been made by th United States.

In the event that we turn over the maintenance of the canal to th Panamanians, there is serious doubt in my own mind as to whethe the people of Panama have the management skills or expertise or th will to maintain these locks as they have been maintained so that the can be used efficiently.

I have flown over these in a helicopter on two occasions. I have see dredging vessels that are in operation constantly dredging materia from the canal. There was one large cut through the canal and it ha been dredged so that it is now 500 feet in width. The ships that pas through the canal may well be 100 feet wide. But this is 500 feet. Thi is a channel which goes through a large cut in the mountain whic is 500 feet wide. These dredging vessels work constantly down ther to keep the material out of the channel so that the vessels can g through.

I wonder, Senator Canada, if you would have any thoughts tha you might want to share with us as to whether or not you believe tha you would have any reservations about continuing the efficiency o the operation of the canal in the event the United States did tur the management over.

As I understand it, immediately 6 months after the ratification o the canal, then title would pass to the country of Panama. Thereafter gradually we would turn over management until I believe somewher in 1989 or thereabouts, and then we would have an administrato who would be a Panamanian. That would be well before the yea 2000. Even then we would have Panamanian management.

Would you have an opinion as to whether or not the managemen skills or the expertise or the will is there or whether on the other han the profits might be drained off for social programs or other les laudible purposes within Panama? Would you have any fear of anything like that happening?

Senator CANADA. Senator Scott, I can relate to you information I received from talking with people who have lived and worked dow there and other information that I have been able to find out on m own although I have never been down there.

I would say this. I have some serious doubts, based on the conversations with many people who have lived and worked down there—and one gentleman worked there for 27 years——

Senator Scott. We have the former Governor of the canal who lives in Virginia.

Senator Canada. Yes.

They all have serious reservations about the Panamanians ability properly to maintain the canal. Look at Panama's budget for this year; 39 percent of it is for interest payments on the debts. So we see they desperately need money.

I would be guessing but I would say that more than likely they will do all that they can to drain off all the money that they can. They would be reluctant to put a great deal back into maintenance I think. The banks will be pressing their demands.

I think many of the other countries are also concerned about that possibility. I believe we would have serious trouble with the operation of the canal if it is turned over to them. But I do not think they have the required expertise, as you pointed out, nor the will.

Senator Scott. Mr. Chairman, in my personal conversations with some of the leaders of the Latin American nations they have privately expressed concern about the maintenance of the canal as well as about the tolls that would be charged.

We hear of solidarity among the Latin American nations, but it is not there.

Thank you, Mr. Chairman.

Senator Allen. Senator Canada, I believe your statement was to the effect that a poll in Virginia shows 67 percent of those responding were opposed to the treaties. Senator Scott says that his mail is 96 percent against them.

Your statement did not state how many were in favor of the treaty. Did the other 33 percent favor it? How were they divided as between those who expressed no opinion and didn't know, and those who were opposed? Do you know?

Senator Canada. I do not have that information. But I know that the percentage of people who were in favor of giving it away as opposed to those who had no opinion was very small.

In my personal travels I have found very few people who were in favor of giving it away.

Very few have said that they have not really thought about it, but most of the people I have talked to—a large majority—are strongly against it. They say it is another indication of our country just giving something away and giving a lot of money away for no apparent reason. They cannot see that it will do any good. On the other hand, they think it will hurt jobs in our State and in our Nation.

I think the potential for job loss is the chief point that I want to express to the committee this morning. I am concerned about jobs in Virginia. Anybody in the Virginia State Senate from an area that would be affected is interested and should be interested.

Senator Allen. Senator Canada, I think you have made a real fine statement. You have made a distinct contribution to the work of the committee and to the public good.

I have no doubt that when this matter comes before the Senate on the floor—the proposed treaties are in the Foreign Relations Committee at this time but when these treaties come for discussion in the Senate I feel sure that good use will be made of the information that you have furnished the committee.

So, we commend you for your statement and for your interest in this most important question. We commend you on your concern for the people of Virginia and those whose jobs would be in danger.

We thank you very much.

Senator Canada. Thank you very much, Mr. Chairman. Thank you very much, Senator Scott.

Senator Allen. We are hopeful that we will have another meeting of the committee tomorrow or early next week. We hope to have before us Mr. McCullough, author of the tremendous work entitled "The Path Between the Seas," having to do with the Panama Canal, and also Mr. Bendetsen, past Chairman of the Board of the Panama Canal Company. We hope to have both of these witnesses Friday and if not at that time then at another time convenient to all.

Our committee is open to any representative citizen who wishes to give us the benefit of their views.

We stand in recess subject to the call of the Chair.

[Whereupon, at 10 o'clock, the subcommittee adjourned.]

PANAMA CANAL TREATY
(DISPOSITION OF UNITED STATES TERRITORY)

FRIDAY, OCTOBER 28, 1977

U.S. Senate,
Subcommittee on Separation of Powers,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 1114, Dirksen Senate Office Building, Hon. James B. Allen of Alabama (chairman of the subcommittee) presiding.

Present: Senator Hatch of Utah.

Also present: Senator Laxalt of Nevada.

Staff present: Quentin Crommelin, chief counsel and staff director; Paul Guller, editorial director; Melinda Campbell, chief clerk; and Deirdre Houchins, minority clerk.

OPENING STATEMENT OF CHAIRMAN ALLEN

Senator Allen. The subcommittee will please come to order.

The Subcommittee on Separation of Powers convenes today to continue its investigation of certain constitutional issues involved in the negotiations conducted by the executive branch for the transfer of U.S. territory and property in the Isthmus of Panama to the Republic of Panama.

Also subject to the investigation of the committee are financial arrangements apparently concluded outside the context of the proposed Panama Canal Treaties. These extrinsic financial arrangements appear to violate the doctrine of separation of powers inasmuch as they deny to the Senate the right to give advice and consent to all aspects of the new proposed treaty arrangements with Panama. Clearly these separately consummated financial deals are properly a part of the proposed treaties, and the committee is seeking to ascertain the best recommendation to the Senate with respect to these extrinsic multimillion dollar financial agreements concluded by the executive department and the Government of Panama.

So the committee in conducting its review of these two major constitutional issues, has been privileged to hear from a variety of knowledgeable witnesses, both in the relevant areas of constitutional law and with respect to the factual backdrop against which these constitutional matters must be resolved. Today the committee is especially honored to hear the testimony of two highly distinguished individuals, both of whom have particular knowledge regarding certain aspects of the proposed canal treaties.

I might say that Mr. Bendetsen was supposed to be our first witness this morning. His statement is quite comprehensive and we will therefore first call on Mr. Torrens to testify inasmuch as his testimony is shorter.

I might say that under the rules of the Senate, we have a period of 2 hours from the time the Senate went in to conduct our hearing. Inasmuch as we went in at 9 o'clock this morning in the Senate, we have only until 11 o'clock to conclude our testimony.

Capt. K. C. Torrens is National President of the Council of American Master Mariners, Inc. and is, therefore, the recognized national spokesman for the captains of vessels belonging to the U.S. merchant fleet. Captain Torrens' remarks will be important to the committee and to the Senate inasmuch as his remarks will represent the views of a highly skilled and highly responsible group of American citizens who will be immediately and very directly affected should the Senate consent to ratification of these proposed treaties.

So at this time, Captain Torrens, we would be happy to receive your testimony. We are glad to have you with us.

TESTIMONY OF CAPT. K. C. TORRENS, NATIONAL PRESIDENT, COUNCIL OF AMERICAN MASTER MARINERS, INC.

Captain TORRENS. Thank you, Senator Allen.

Mr. Chairman, the Council of American Master Mariners, Inc., is a professional nonprofit association of shipmasters who now command, or have commanded American flag oceangoing vessels. The stated objectives of the council are to render a public service by voicing, as the need arises, the opinion of distinguished master mariners concerning professional subjects of a common interest to them and of concern to the maritime industry. It is a recognized obligation of the council to take such action as deemed appropriate, to promote the prosperity of the American merchant marine and to endeavor to make it of maximum benefit to the Nation.

Throughout the course of world history seamen in general, and master mariners in particular, have contributed immeasurably to the development of science, culture, and civilization. The great discoveries, lines of communications and commerce of the world have been developed by seamen and by commercial interests who were led, counseled, and directed by master mariners. We, therefore, feel it appropriate to present our views concerning the Panama Canal and the future of this vital waterway.

The main concern of the Council of American Master Mariners is that the Panama Canal be available as an unhindered waterway to all commercial shipping, as has been the policy and practice since the United States opened the canal. Under the existing treaties, the canal has been successfully operated as a service to international maritime traffic on a nonprofit and nondiscriminatory basis. We believe in the concept of a freely available international waterway and oppose any changes that would promote the creation of a profit-producing tollgate concept.

The proposed treaties do not appear to improve in any way the stability or effectiveness of the canal but do raise serious questions as to the future of the waterway.

The Council of American Master Mariners is deeply concerned by the following:

First, the terms of the treaty giving total control of the canal to the Panamanian Government raise the possibility that right of passage and accessibility may be impaired, curtailed, or perhaps even denied as a consequence of local domestic quarrels, internal upheavals, or at the whim of a future administration.

Second, the possibility of lower standards for pilots assigned to navigate large and extremely costly vessels in these restricted waters give rise to concern. The Panama Canal is the only body of water in which a shipmaster relinquishes responsibility for the navigation of his ship to a pilot. We view with anxiety a situation where masters may have to entrust the navigation of their commands to persons of unknown or unproven skills. The present high standards of seamanship and shiphandling have assured all ships safe passage by responsible pilots, carefully selected from experienced officers of the U.S. merchant marine who have proven their competence and skill after rigorous professional qualifying examinations.

Third, we question the assumption that the Republic of Panama can or would adequately protect the canal from sabotage or attack. The statement of understanding issued by President Carter and General Torrijos Herrera, which purports to clarify the right of the two countries to defend the canal against any aggression states in part:

> Under the treaty concerning the permanent neutrality and operation of the Panama Canal—The Neutrality Treaty—Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall in accordance with their respective constitutional processes, defend the canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the canal or against the peaceful transit of vessels through the canal.
>
> This does not mean, nor shall it be interpreted as a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.

Do the "Internal Affairs" or the "Political Independence" of Panama include the actions of the many factions, either political or ideological, that might threaten the canal as leverage for their political goals, to gain recognition, or to overthrow the ruling regime? In any such situations, the United States would be in a sensitive position and perhaps powerless to take any protective action within the terms of the Carter-Torrijos Statement.

Four, tolls presently are subject to public review and must be justified as being required to meet operating expenses. It is feared that, under the proposal, we can anticipate escalating tolls to generate revenue beyond the operating expenses of the canal. Future increases may be dictated by the vagaries of local domestic pressures that could price the canal out of economic viability for existing traffic, or tolls could effectively become the means of levying tribute.

Five, we are apprehensive of the limitations of article XII, section 2(b) which prohibits the United States of America from negotiating with third States for the right to construct an interoceanic canal or any other route in the Western Hemisphere, except as the two parties may otherwise agree. These limitations effectively block any effort to provide an alternate route to the year 2000.

We recognize that this is an extremely sensitive, complex, controversial, and emotional issue with farreaching implications. We fear that the commitments already made, regardless of how well intended, would solve none of the problems of the Panamanian people and have placed the United States in an extremely awkward position. Those problems that exist should be identified and appropriate measures taken to resolve them. The United States should not abrogate the responsibility of providing a freely accessible waterway for international maritime commerce in order to placate the parochial interests of any political group. We suggest that the Panama Canal should be considered in the interests of all the users as an international public utility which, once provided, shall necessarily be continued and should not be permitted to become a profitmaking enterprise for the benefit of any entity.

Thank you, Mr. Chairman.

Senator ALLEN. Thank you very much. That is a fine statement indeed. Your testimony certainly voices the concerns of the Council of American Master Mariners who obviously have a stake in this matter.

We recognize your concern for American shipping.

Do you see any provisions of the new treaty that would be of benefit to American shipping anywhere at all?

Captain TORRENS. No, sir.

Senator ALLEN. Everything would be stacked against American shipping, wouldn't it?

Captain TORRENS. As I see it, there is nothing there that would improve in any way the situation as it now stands.

Senator ALLEN. Can you think of any good reason why these treaties should be approved by the Senate?

Captain TORRENS. I cannot.

Senator ALLEN. I noticed that you commented on the agreement entered into between the President and Mr. Torrijos, which by the way has not been signed and is more or less a memorandum of a joint press release, and you suggested that falls short of accomplishing anything. How do you view this supposed agreement?

Captain TORRENS. I find that the treaty itself is difficult to come by, to study it closely. The wording that I mentioned about the Torrijos agreement was based on what I had seen in the paper. I trust that it is accurate.

But what bothers the council is that it prevents us from doing anything that would interfere in the internal politics of the country. What does that mean in practical effect? This is where I feel some of the greatest danger will lie. Because of disagreements between the local factions the canal could be used as a lever to promote the interests of certain parties. In those cases we would be hard put to see how our action would not infringe upon that agreement.

Senator ALLEN. In other words, the supposed agreement gives the United States the right to defend against all countries except Panama and they might be the ones that we would need to defend against; isn't that right?

Captain TORRENS. That is right. That is the way I see it.

Senator ALLEN. If any country would endanger our limited control and use of the canal, it might not be another Central or South American country, but it might be Panama itself, possibly because of internal dissertion.

Captain TORRENS. I believe this would be our area of greatest concern.

Senator ALLEN. How often have you been on ships that went through the canal?

Captain TORRENS. I went through first when I was 7 months old, but I was not in command of anything.

Later than that, my service as a master has been primarily in the Atlantic and in the Pacific and Indian Oceans. I have not transited the canal myself in command of a ship. However, in the council we have many who regularly transit the canal. Almost weekly I converse with masters whose regular trade route is through the canal with large ships.

Senator ALLEN. The statements you have given represent the views of the Council of American Master Mariners; is that right?

Captain TORRENS. Yes. They represent the executive committee acting through various chapters. We have taken a vote on this and my statement is representative of the feelings of the council.

RESOLUTION PASSED

Senator ALLEN. Have they passed a resolution?

Captain TORRENS. Yes. The executive committee passed a resolution approving the statement that I made today.

Senator ALLEN. How many members are there in the council?

Captain TORRENS. Approximately 1,000.

Senator ALLEN. They are all master mariners?

Captain TORRENS. Yes, they are all master mariners who have sailed or are presently sailing in the command of large oceangoing vessels.

Senator ALLEN. The canal is operated more or less now on a nonprofit basis, is it not, although the Panama Canal Company seeks to pay back the investment of the American taxpayers. The rates are not exorbitant are they? It is not a profitmaking organization; is that right?

Captain TORRENS. As I understand it, that is true and that is the way we feel it should be operated. As I understand it, the tolls we think should be subject to public review as to whether they meet the operating requirements of the canal and if raised under that procedure we presumably would have no objection.

INCREASED RATES

Senator ALLEN. Is it your understanding that rates are going to be increased in order to give Panama some $70 to $100 million a year out of the revenues?

Captain TORRENS. I would assume that if they operated even as efficiently or even more so than ourselves that they would still have to increase the rates in order to get the profit so that they could get their stipend.

Senator ALLEN. Do you think Panama is capable of operating the canal?

Captain TORRENS. Yes. Anyone having the proper expertise is capable of actually operating the canal. I do not take away from them their capability, as long as they have the responsibility to do it.

This is where I find a problem. I have trouble seeing that they would have the responsible government and would be responsible people who would realize how vital the canal is internationally and would not use it for their own political interests. In that case, I do not feel that they could operate it.

Senator ALLEN. As far as the direct technical operation of the canal, however, you think that they can do that?

Captain TORRENS. I think any particular job in the canal probably could be done as well, yes.

Senator ALLEN. What about pilots for the ships?

Captain TORRENS. The pilots could also be changed to do an adequate job. Again, I get back to the responsibility. Who are they going to be responsible to? This is the area that I have great concern about. The highest trained man, if he is not responsible to a higher authority for doing a good job, is not going to do a good job.

Senator ALLEN. You think the instability of the government there is a real threat and danger?

Captain TORRENS. I feel I have to limit myself to my expertise. I really do not know how stable their government is, but there is nothing that leads me to believe that it is more stable than ours.

Senator ALLEN. I notice you call attention to the fact that under the treaty we would be precluded from negotiating with another country for another canal without the permission of Panama for the next 23 years. Do you think that is advisable to have a prohibition such as that?

Captain TORRENS. I think it is a very poor policy. I do not see how we could enter into any type of agreement which would tie our hands in such manner.

Senator ALLEN. Is there any admiralty law in Panama?

Captain TORRENS. I do not know what their admiralty procedures are in Panama.

Senator ALLEN. Do you think there will be a need in the reasonably foreseeable future for having a second canal?

Captain TORRENS. Yes.

Senator ALLEN. Do you think in the next 23 years that we will have a need for it?

Captain TORRENS. Probably we could use another canal very shortly. The limitations of the Panama Canal are there. I feel that sooner or later steps should be taken to make a sea-level waterway of some type which would not be subject to the same type of problems that a lock canal is.

Senator ALLEN. Would you favor building another canal in Panama?

Captain TORRENS. I do not know where the best route would be. I would say that the geography should dictate it more. It should be one of the prime concerns. Also a major concern would be the stability of the government through whose territory it might happen to go.

Senator ALLEN. Do you anticipate that there will be a whole lot more traffic through the canal of oil from the Alaskan pipeline when that is being utilized to the fullest degree?

Captain TORRENS. I don't know the details of that but I have heard that there will be oil that will be traveling by tanker from the North Slope via the canal to the east coast or that the oil could be shuttled through there.

Senator ALLEN. Are some of the members of your Council masters on oil tankers?

Captain TORRENS. Oh, yes. Members of the Council represent a broad spectrum of all types of U.S. Merchant Marine ships, including tankers.

Senator ALLEN. Is any priority given to shipping of any nation at this time through the Panama Canal?

Captain TORRENS. As far as I know, there is not. I believe military ships have priority. Other than that my understanding is that ships are taken by the dispatcher and given a certain way in which to proceed. Certain vessels are only daylight ships. There are other considerations of that sort. So there are certain limitations whereby other ships and smaller ones might get priority on a day-to-day basis.

But as far as I know it is not discriminatory.

Senator ALLEN. Do you think the approval by the Senate of these treaties would be contrary to the best interests of the people of the United States and the shippers in particular?

Captain TORRENS. Yes, I do.

Senator ALLEN. It would take quite a few years to build another canal, I imagine. Giving up the only one that we have, certainly it would seem to me not to be a very good business venture on our part. What do you think?

Captain TORRENS. I agree, especially when you also tie your hands about building an alternate canal while you are waiting for this one to fall out of your hands.

EXTREME GOOD-NEIGHBOR POLICY

Senator ALLEN. It is laudable to be a good neighbor with the Central and South American countries, but do you feel that these treaties are carrying good neighborliness a little bit too far?

Captain TORRENS. I do not want to get into the politics of it because I do not feel that that is my area. But I would say that the responsible individuals in many other countries may not feel that we are doing them a good service by giving this canal away to Panama.

Senator ALLEN. I understand that that is the case. Many of the Latin American countries there don't want to see the American presence removed. The signing gala and all the ceremony and all the representatives from other nations that were drawn into the premature celebrations do not alter that fact. If you talk to them privately they might express other views with regard to the canal.

Captain TORRENS. My observations are that we seldom gain respect by giving things to people.

Senator ALLEN. Increased tolls, of course, would increase the ultimate price of the product which is being carried in American shipping; would it not?

Captain TORRENS. That is correct.

Senator ALLEN. Most of the shipping that goes through the canal is either headed for American ports or it comes from the American ports; is that correct?

Captain TORRENS. I believe this is true. However, I do not know the statistics.

Senator ALLEN. So any imposition of added tools would just add to inflation and add to the high price of products being transported; is that right?

Captain TORRENS. That is the way I understand it.

Senator ALLEN. Senator Paul Laxalt is here and he is interested in these issues. I would like to invite him to pose any questions he might wish to present.

Senator LAXALT. Thank you. I think my senior colleague has covered the areas well. Your responses have been helpful.

You say you have 1,000 members of your council?

Captain TORRENS. Approximately 1,000, yes.

Senator LAXALT. How many members are there nationally? Who are the members of the council?

Captain TORRENS. I would say there is no other organization of ships' masters. I would say that probably we represent three-quarters of them. There are approximately 25 percent who may not be active members in the council.

Senator LAXALT. Are these mariners active at the present time or retired or both?

Captain TORRENS. Both.

Senator LAXALT. Are the bulk of them active at the present time?

Captain TORRENS. The ones that we have today I would say about 50 percent are active and 50 percent are retired or have gone into some other line of work.

Senator LAXALT. Is there any division whatsoever in their sentiment toward the treaties or are they fairly unanimous?

Captain TORRENS. I have found that in general they would have gone for a more adamant stand than my statement would indicate.

Senator LAXALT. What might that have been?

Captain TORRENS. There would have been maybe a stronger statement against signing the treaty.

My statement I felt would be subject to questioning and the main concern of the council—and the executive committee agreed with me—was that the statement would be the area in which we have expertise not as to whether the canal is or is not owned in perpetuity by the United States or the like. This matter was the subject of many arguments. Whether this would be of benefit to the South American people or the Panamanian people in general could be a big argument. Whether they are entitled to certain things or not—these are areas I could not go along with. But I think there are certain members on the council who would have said or would have had a stronger flag-waving type of approach than our statement given this morning. Our statement against the treaties is confined to our area of particular expertise.

Senator LAXALT. If I understand the gist of your testimony, No. 1, the use of the canal by the merchant marines is very significant and terribly important not only to the people whom you represent but also to the interests of this country.

Captain TORRENS. Yes.

Senator LAXALT. Your concern is not expressed so much in political terms—you indicate you don't know the political situation—but I gather that your concern is that we are trading a fairly stable situation for one that we don't know to be stable.

Captain TORRENS. Right.

Senator LAXALT. As far as the Panamanians themselves are concerned it is my understanding that there are a couple of hundred ship captains in there overall, not Panamanians, but overall; is that right? Only three of them are presently Panamanians; do you know that figure?

Captain TORRENS. I do know what the actual figure is. Pilots, do you mean?

Senator LAXALT. Yes.

Captain TORRENS. The pilots in the canal, as I understand it, are taken from the U.S. merchant marines and qualified U.S. Coast Guard merchant marine officers who have served on American flagships. There may be some that are Panamanians in origin.

Senator LAXALT. As I understand, there are three or four at the present time.

Does this require a high level of expertise?

Captain TORRENS. Yes; it does.

Senator LAXALT. Over what period of time would it take to train someone who is totally unfamiliar with the process?

Captain TORRENS. I think it would take a considerable amount of time in training and ship handling, plus the apprenticeship which would be required for the particular waterway, which is the canal and entering the locks.

Again, I feel that I would not want to take it away from any individual as to what his capability would be. There may be many Panamanians who would be perfectly qualified to do this kind of work.

What I am saying, is that the responsibility that they would have toward their job and their responsibility that they would have toward running an efficient operation, is of concern to us.

Senator LAXALT. I gather in summary, that you find no compelling reason whatsoever as to why the U.S. Senate should ratify these treaties and you find many reasons why we shouldn't.

Captain TORRENS. That is correct.

Senator LAXALT. Thank you very much.

Thank you very much, Mr. Chairman.

Senator ALLEN. Thank you very much, Captain.

MID-GULF SEAPORTS
MARINE TERMINAL CONFERENCE

International Trade Mart Building / P. O. Box 60046 / New Orleans, La 70160

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Legal Advisor

WEDNESDAY, SEPTEMBER 28, 1977 NEW ORLEANS, LOUISIANA

TO: THE PRESIDENT OF THE UNITED STATES
THE MEMBERS OF THE CONGRESS, AND THE SECRETARY OF COMMERCE

MR. PRESIDENT, CONGRESSMEN AND MADAME SECRETARY:

THE MEMBERS OF THE MID-GULF SEAPORTS MARINE TERMINAL CONFERENCE WHOSE FACILITIES HANDLE ANNUALLY OVER 13,600 OCEAN-GOING VESSELS ENGAGED IN INTERNATIONAL TRADE AND COMMERCE MOST STRONGLY URGE AND REQUEST THAT THE PANAMA CANAL TREATY NOT BE RATIFIED UNTIL AND UNLESS PROVISIONS ARE MADE TO LIMIT TOLLS AND CHARGES AT THE PANAMA CANAL TO THAT LEVEL NEEDED TO DEFRAY OPERATING, MAINTENANCE AND CAPITAL COSTS OF SAID FACILITY, AND THAT THE MARITIME TRADE AND COMMERCE OF THE UNITED STATES OF AMERICA NOT BE BURDENED WITH THE COSTS OF INTERNATIONAL DIPLOMACY, EXPENSES THAT ARE COMPLETELY UNRELATED TO THE ECONOMIC COST OF PROVIDING CROSS-ISTHMUS PASSAGE OF VESSELS AND CARGOES. THE COSTS OF PAYMENTS TO THE GOVERNMENT OF THE REPUBLIC OF PANAMA, IF MET BY INCREASED PANAMA CANAL TOLLS, MAY WELL RESULT IN DECREASED USE WITH A RESULTANT DECREASE IN TOTAL CANAL REVENUES AS WELL AS BURDENING SPECIFIC AMERICAN EXPORTS, ESPECIALLY GRAIN AND MACHINERY MOVING TO THE FAR EASTERN, ASIATIC AND PACIFIC NATIONS, TO SUCH AN EXTENT AS TO PRICE THEM OUT OF WORLD COMPETITION THEREBY DEPRIVING OUR NATION AND ITS ECONOMY OF THE LARGEST AND BEST SOURCE OF FOREIGN EXCHANGE AND INCOME SO VITAL TO A FAVORABLE BALANCE OF PAYMENTS.

RESPECTFULLY,

EDWARD S. REED
CHAIRMAN
MID-GULF SEAPORTS MARINE
TERMINAL CONFERENCE

EMBER PORTS

ATON ROUGE / BEAUMONT / GALVESTON / GULFPORT / HOUSTON / LAKE CHARLES / MOBILE / NEW ORLEANS / ORANG

SEPTEMBER 28, 1977 GULFPORT, MISSISSIPPI

TO: THE PRESIDENT OF THE UNITED STATES, THE MEMBERS OF THE CONGRESS

MR. PRESIDENT & CONGRESSMEN:

THE GULF PORTS ASSOCIATION, AN ORGANIZATION REPRESENTING THE PUBLIC DEEPWATER PORTS OF THE STATES OF ALABAMA, FLORIDA, LOUISIANA, MISSISSIPPI AND TEXAS THROUGH WHOSE FACILITIES OVER ONE-HALF OF ALL GRAIN EXPORTS FROM THIS UNITED STATES MOVE AND THROUGH WHOSE PORTS SOME 37.8% OF ALL U.S. CARGOES MOVE IN INTERNATIONAL TRADE AND COMMERCE, SINCERELY AND VIGOROUSLY URGE THAT THE PANAMA CANAL TREATY NOT BE RATIFIED AND BECOME EFFECTIVE UNLESS AND UNTIL REALISTIC, EFFECTIVE AND CONTROLLABLE SAFEGUARDS ARE EFFECTED TO ASSURE FAIR, EQUITABLE AND ECONOMICALLY REALISTIC CANAL TOLLS, RATES DIRECTLY RELATED TO THE OPERATION AND MAINTENANCE OF THE CANAL, AND NOT INCLUDING THE COST OF INTERNATIONAL DIPLOMACY. TO BURDEN THE CARGOS AND VESSELS TRANSVERSING THE CANAL WITH THE ADDITIONAL AND VERY SUBSTANTIAL NON-OPERATIONS COSTS OF PAYMENTS TO THE GOVERNMENT OF THE REPUBLIC OF PANAMA CAN HAVE AN EXTREMELY ADVERSE EFFECT ON NOT ONLY THE CANAL MOVEMENTS, BUT CAN WELL PRICE CERTAIN U.S. EXPORTS WHICH CAN NOT ECONOMICALLY UTILIZE OTHER ROUTINGS OUT OF WORLD COMMERCE. THE EFFECT ON ALL OF THE UNITED STATES PORTS LOCATED ON THE GULF OF MEXICO COULD BE DRAMATICALLY DETRIMENTAL UNLESS RATES AND TOLLS ARE MAINTAINED AT A LEVEL COMMENSURATE WITH THE COSTS OF CANAL OPERATION.

RESPECTFULLY,

ROBERT C. ENGRAM, PRESIDENT
GULF PORTS ASSOCIATION

Senator ALLEN. Our next witness is Mr. Karl R. Bendetsen. We are delighted to have Mr. Bendetsen appear as a witness. He is one of the most knowledgeable persons in the country on the history of the Panama Canal, on the history of the various treaties that we have had with Panama, and on the actual operation of the Panama Canal. Under President Truman he was Under Secretary of the Army and had direct control over the operation of the canal from his post as Chairman of the Board of the Panama Canal Company which of course is responsible for the actual operation of the canal.

Mr. Bendetsen has prepared a remarkable statement here which I think should be required reading for all persons in the country who are interested in this question.

There is so much lack of knowledge about the Panama Canal and the treaties regarding the canal and the manner in which the canal came into existence that if every person in the country who is interested in the Panama Canal could read Mr. Bendetsen's statement, then each would certainly have a good working knowledge of just what the situation is.

Both of these statements today will be part of these hearings in book form. We certainly want to see them made available to as many members of the American public as possible.

We look forward to viewing the testimony of Mr. Bendetsen.

We do have time constraints. I would suggest that if it is satisfactory to you, Mr. Bendetsen, that you give a summary of your overall statement with the understanding, of course, that your full statement will be made a part of the record. This would be on account of the time constraints that we have.

Under the Senate rules our committee can meet only for 2 hours after the Senate goes into session. Inasmuch as it went into session at 9 o'clock this morning the rule would require us to conclude our testimony at 11 o'clock.

So, I would like for you to handle matters as you see fit within those time limitations.

TESTIMONY OF KARL R. BENDETSEN, FORMER UNDER SECRETARY OF THE ARMY AND CHAIRMAN OF THE BOARD OF THE PANAMA CANAL COMPANY

Mr. BENDETSEN. Mr. Chairman and Senator Laxalt, I thank you for the complimentary sentiments you have expressed. It is, of course, satisfactory to me to proceed with the convenience of the committee in mind. I have my extended statement here which if need be I can make available.

Senator ALLEN. That will be put in the record exactly as prepared.

Mr. BENDETSEN. I will depart from the extended statement and I shall undertake to condense my remarks. There may be time, perhaps, for some discussion.

My first introduction to the canal and the Panama Railroad Company was under the act of 1950, September 26, in which the entire structure was changed. The Congress created the Panama Canal Company, a New York corporation, known as the Panama Railroad Company was merged into it.

All the municipal and governmental functions were separated, and the commercial and utility functions, and the power and the responsibility of ratemaking was vested in the Panama Canal Company.

The concept of the 1914 act was changed in that the 1950 act created a Board of Directors under a Chairman. The President of the Company became the general manager of all utility and commercial operations. Ex-officio, the Governor of the Canal Zone is the President of the Panama Canal Company. In his capacity as President he reported to the Chairman. His governmental role, on the one hand, and his role as president of an extensive and complex public utility company are separate and not commingled.

I held the position of Chairman for approximately 5 years although I resigned as Under Secretary of the Army in October 1952. I was asked to remain. This request was repeated by President Eisenhower.

When the undertakings I had accepted in private life and those involving the chairmanship came into conflict in the sense that there was not time to do both, I submitted my resignation. The chairmanship carried with it no compensation.

MANY FALSEHOODS

There has been a great deal of rather outrageous propaganda to the effect that the treaty of 1903 was somehow wrested under pressure, duress and force from the fledgling Panamanian Republic. This is nonsense. No force, duress or pressure was ever applied. The conspirators of the Province of Panama—a Province of Colombia—decided that in their own self-interest when the Colombian Senate declined to ratify the treaty which had been negotiated by Secretary Hay with Ambassador Herran of Colombia that they would secede from Colombia and attempt by all means to get the canal for Panama. These people knew that otherwise the canal would be in Nicaragua because the Spooner Act endowed the President of the United States with the authority and the power to negotiate, either with Colombia for a canal at Panama, or with Nicaragua under certain terms and conditions all of which were well known to the entire world—the world was deeply interested—well known to Latin America. It was not a secret that the Spooner Act made clear that the President was directed to negotiate to secure U.S. territory.

Then President Roosevelt was required to obtain territory, soil of the United States, not a colony but an area solely under U.S. sovereignty and control. This was known to the Colombians, to the conspirators of Panama, and to Nicaragua. The treaty that was then negotiated provided for this.

Senator ALLEN. Excuse me just a moment. We seem to be operating in a different fashion now. In those days the President proceeded only under the authorization and direction of the Congress. Procedures have certainly changed.

As it now is our negotiators have entered into this treaty without any authorization from Congress whatsoever.

We understand from the administration that they do not even plan to submit this treaty disposing of American property to the

House of Representatives as required by article IV, section 3 of the U.S. Constitution.

Mr. BENDETSEN. The contrast is exactly as you expressed it, Mr. Chairman. The chasm between the two treaty events is so broad as to be unbridgeable.

The President did negotiate pursuant to a specific act of Congress. As you may know, the sentiment of the United States and in the Congress was in favor of Nicaragua as a site for the canal. Although the total distance from the Caribbean shore to the Pacific shore in Nicaragua is broader by a good many miles than the narrow neck of the isthmus in Panama where the canal lies, the actual land bridge is narrower because the San Juan River and Lake Nicaragua together form a ready made waterway across the major part of that distance. Only a very narrow neck of land would have to be channeled either for a lock canal or a sea level canal.

The geology of Nicaragua is dramatically different from that in Panama. It is much more favorable for excavation. This aspect has not been frequently discussed during the Senate hearings insofar as I know, although the unfavorable Panama geology underlay the French collapse. The geology in Panama is so intractable and so uniquely fractured and so laden with clays so treacherous in character in the 6 months of the rainy season in each year any excavation slides away and the excavation virtually disappears.

In Nicaragua the geology was different and favorable. The Congress knew that. The peoples of the United States knew that. The Panamanian conspirators knew that. They were desperate to obtain the 1903 treaty.

The reason for the Spooner Act giving an alternative with the Panamanian choice being first was because it was believed that the French infrastructure would be useful. But Panama is only one of seven routes across the isthmus which runs from Tehuantepec, Mexico, down through to the border of Colombia. The isthmus is not Panamanian. It is Central America that constitutes the isthmus.

The reason for placing Panama in the Spooner Act at all was that there was some infrastructure there which was thought to be quite useful although the equipment proved to be utterly unsuitable, as it turned out. It was thought the United States would get a head start and all concerned were anxious for that.

So the attempt was first made with Colombia.

POOR COMMUNICATIONS

The proposed treaty was very suitable. It satisfied the Spooner Act. Communications between Washington and Bogota were difficult. It took 3 weeks to travel from Washington to Bogota. The cable connections were a sometime thing. Washington did not really understand why the Colombian Senate was stalling—because of poor communications.

The real reason why the senate did not ratify in Colombia—and I think this background is important for my next point—was because this was not realized in Washington that the French corporation or the "New Company," which had been created in order to salvage something out of the wreckage of the great de Lesseps failure and was to receive $40 million—it was probably worth it—for the infrastructure that we obtained would have lost its franchise in a few months. Their rights would have expired in 6 months. The Colombian Senate knew this and they were angling for that $40 million. This is why they stalled. The right to the French portion would have been Colombias.

Senator Allen. In other words, at the expiration of 6 more months the United States would not have had to pay the $40 million to the French, and the money might then have been available to Colombia; is that correct?

Mr. Bendetsen. That is right, exactly.

So, when the Colombian Senate did not ratify the treaty, these eight conspirators in the Province of Panama wanted this canal for their own benefit.

What happened? They decided, without any invitation from the President of the United States or anyone else from the United States, to secede. They hoped that the United States would protect them, which it did. On November 2, 1903, Commander Hubbard, captain of the U.S.S. *Nashville*, received secret and confidential orders. I quote interesting history: "Maintain free and uninterrupted transit." What was the basis for that? The basis for that was a treaty with Colombia of 1846 known as the Bidlack Treaty. Article 35 of that treaty obligated the United States having built the Panama railroad to protect it from all assaults, external and internal.

Senator Allen. We need a provision like that in the new treaty, don't we?

Mr. Bendetsen. Yes, sir—definitely so. If there is to be any vestige of a residual right to defend the canal. I resume.

> Maintain free and uninterrupted transit. If interruption threatens by armed force, occupy the line of the railroad. Prevent landing of any armed force with hostile intent, either government or insurgent, either in Colon, Portobello or other point. Send copy of instructions to the senior officer present at Panama on arrival of U.S.S. Boston.

I won't quote the rest of it.

The uprising occurred that day at 6 p.m. on the evening of November 3. The presence of ships standing off was then well known to all. Panama had seceded. No pressure had been applied and no shots were fired. No U.S. troops or marines or any other personnel landed. Some Colombian troops joined the revolutionaries. The others voluntarily withdrew. There was no engagement. There is no moral basis whatsoever to support the claims of colonialism, imperialism, or the demand for the so-called return of something Panama never had.

ROLE OF SENATOR JOHN TYLER MORGAN OF ALABAMA

Senator Allen. Are you familiar with the role that Senator John Tyler Morgan of Alabama played in the Panama Canal?

Mr. Bendetsen. Senator Morgan played a leading role in the Senate. He was a member of this august body of great distinction, knowledge and ability. He understood all of the routes. There were seven as I testified. They were surveyed under President Grant. Senator Morgan carefully studied all these and later sights. He favored the Nicaraguan Canal. But in the final result as a statesman, great that he was, he accepted a compromise with an alternative. That is the legislation known as the Spooner Act which was then adopted with his support.

Senator LAXALT. May I ask a question?

What is the historical basis of these various statements made in connection with the Province of Colombia, the uprising, the revolt, and eventually entering into the treaty with the United States? What is the historical basis? How would I respond if somebody asked me why these statements are made, how do you support them?

NEW BEST SELLING BOOK

Mr. BENDETSEN. I would suggest, sir, in answer to such a question. You might refer to the book "The Path Between the Seas." It is a bestselling book. It contains this history. Even better than the book would be the hearings of this committee which have already been published. They present an accurate and fascinating account.

Senator LAXALT. Do you consider the book "The Path Between the Seas" to be fairly accurate?

Mr. BENDETSEN. Accurate with regard to the facts about the Colombian Treaty and about the Panama revolts as well as what actually took place. He editorializes however and I do not accept his speculation at all. The historical facts about the Panamanian Secession, their designation of Bunau-Varilla as the Minister Extraordinary and Plenipotentiary, whose services they avidly sought, and the opinions of U.S. citizens as well as of the other Latin American nations have no basis in fact. He selectively quotes a few editorials to support his editorial conclusions.

Senator LAXALT. There is an impression here on Capitol Hill that this is a document which supports the theory that we took advantage of the Panamanians and the Colombians. Do you subscribe to this interpretation of the book?

Mr. BENDETSEN. I certainly do not. This is a false claim as to Panama. However, as to Colombia there was ground for complaint that the United States did act in haste and should have extended a greater opportunity to Colombia; and that our actions under article XXXV of the Bidlack Treaty of 1846 with Colombia gave Panama its sought for opportunity. However, in 1922 Colombia and the United States fully and amicably settled their differences in a new treaty. The United States then paid Colombia $22 million.

He concludes that probably in retrospect this caused all of Latin America to develop a low opinion of the Yankees. Many of those nations have until now, always been our friends and allies.

He cannot really support that except by reference to a few editorials. One can find some editorial somewhere to support any view. We are blessed with freedom of the press.

Senator LAXALT. Is there that degree of interest presently perceived in the Latin American countries toward this problem or do they pretty much leave it to us?

Mr. BENDETSEN. I have prepared some remarks in my direct testimony but let's talk about it now, sir.

There was an article in the Washington Post to which I referred in my extended statement, a by-line.

SUPPORT OF FOUR COUNTRIES

Senator LAXALT. A correspondent in a meeting with Torrijos?

Mr. BENDETSEN. A meeting of 20 Mexican journalists with Torrijos. I know that was published widely throughout Latin America. I have many relationships there that I have had over the years. These are very fine and sound ones. He said that only four countries have supported him in his demand for the Canal Zone. He said that they were Colombia, Venezuela, Costa Rica, and Mexico.

Senator LAXALT. Was there a change in the situation that caused all these countries to be here for the treaty signing in Washington?

Mr. BENDETSEN. I would say there was no change in the situation. I have some material in my extended statement in which I am proposing to include in my oral testimony.

First of all, many of the chiefs of governments and heads of state who received these invitations were very unhappy with these invitations. They did not feel that they could very well decline an invitation from the President of the United States but they were neither in favor of the proposed treaties nor of the U.S. moves toward normalizing relations with Cuba.

While the great signing ceremonies and the great events which were staged thereafter, talked to a number of people from various countries in Latin America whom I knew, some of whom had served in the diplomatic service here. They could not bring themselves to believe that the United States would actually go through with the six-point memorandum which was signed by Kissinger and by Tack, the Foreign Minister of Panama at that time, to cede the Canal Zone and the canal to Panama.

They expressed great concern about the pending treaty and about the move to normalize relations with Cuba.

Senator LAXALT. Why don't they say it publicly then?

Mr. BENDETSEN. This is a difficult question to answer. I can't speak for them, of course, but my own experience tells me that they are not able to stand up to the pressures of the United States.

MANY COUNTRIES UNHAPPY

Brazil is very unhappy with us. Argentina is very unhappy with us. I believe that Paraguay, Uruguay, Bolivia, and Chile are also unhappy with us. Some of the Central American republics are very unhappy with us. I cannot speak for them. I don't want anyone to interpret what I am saying as speaking for them, but you can recognize unhappiness when you see it and when you hear it.

I have recently been to Latin America. There is great unhappiness there. Certainly there is no unanimity in favor of what the United States is now doing and proposing to do.

PROTECTIVE DEVICES MAKE SABOTAGE DIFFICULT

Senator ALLEN. Mr. Bendetsen, I want to be sure to ask you a couple of questions before our time catches up with us. There has been a whole lot said about the ease with which the Panama Canal could be sabotaged. Do you have any information that you could give us on this from your knowledge of the canal and its susceptibility to sabotage?

Mr. BENDETSEN. Yes, sir. I do have indeed.

Since 1942 protective devices, which I cannot describe to you because they are classified, have been protecting the locks and the gates and the dams. Sabotage would be extremely difficult and if successful could not close the canal for an extended period. Even a ship with a conventional bomb aboard which blew itself up in the locks would not disable the canal for an extended period of time.

But these protective devices themselves need protection, they need U.S. jurisdiction, police power, and the cushion of the Canal Zone. Once the Canal Zone expires and ceases to exist, as would happen immediately upon the coming into force of this proposed treaty, not in the year 2000 but immediately the United States loses all jurisdiction and most of its police power. Then in 30 months we will lose all of our residual police power. The Canal Zone ceases to exist and our police power is gone and we have 4 of 14 military bases. The canal itself, the security systems, the special security personnel positions all lost, and the protective devices become highly vulnerable. Contrary to current allegations in support of the pending treaties, sabotage, as such, is now next to impossible and could not in any case disrupt canal transits for extended periods. Confirm the treaty as is and sabotage would be easy.

These devices and the whole canal become rather naked.

To answer your question, it is next to impossible now and it would become very vulnerable after this treaty goes into effect.

Senator ALLEN. The canal would be much more susceptible to sabotage with the buffer of the Canal Zone withdrawn as the treaties would provide. At present, while we have the Canal Zone as something of a buffer strip, the canal can be better protected; is that correct?

Mr. BENDETSEN. Yes; it would be very much more vulnerable and susceptible without the zone.

Senator ALLEN. Instead of lessening the danger of sabotage, then we are increasing the danger of sabotage through the treaties; is that correct?

Mr. BENDETSEN. That is correct.

Senator ALLEN. But even with the greater susceptibility of sabotage under the treaties, these devices that you speak of would be a protection against sabotage.

What about if the locks should be blown up? What method of operation of the canal could be used in that case?

Mr. BENDETSEN. It is difficult to answer in detail without going into the classified aspects. But I will give a generalized answer. The protective devices would foreshorten the time when the canal would be able to resume operations for the transit of ships in both directions.

I mentioned that protective devices apply to the lock, gates, and the dams.

One must realize that the canal cannot operate without abundant supplies of fresh water. The Pacific waters never touch the Atlantic waters. This may be a good thing. Maybe it would be unwise to have a sea level canal. Nobody really knows. The Pacific sea snakes, for example, and other marine life indigenous to the Pacific would infest the Atlantic and might deplete the food fisheries of the Atlantic. Some people say this. I am not an expert on that.

But the fresh water supplies are vital. Unless the watershed is protected by the Canal Zone in its present form, with continued U.S. jurisdiction over our territory the watershed will be in danger and the canal would be at risk.

Senator LAXALT. Let me ask a question on this before we move on.

Mr. BENDETSEN. Just let me complete this. The protective devices as to the dams and locks and the abundant supplies of fresh water are part of the whole picture. Torrijos' statement of September 12, 1977, in which he said that the canal is as indefensible as a newborn baby is hardly the case. It is not the case.

Senator LAXALT. What is connection between the protective devices as such and the buffer zone?

Mr. BENDETSEN. Protective devices need protection. We are in a position to protect them as long as we have the Canal Zone and as long as we are the sovereign and have the right to use sovereignty as if we were sovereign. It is nonsense to say that that is any different than being sovereign. Nobody else can exercise this power, only the United States.

Because of that package of security with the zone being 10 miles wide, with 14 military bases so on, with police power and efficient police, with very important security personnel and security positions which we would lose, and with various other protective devices that would alert very positively any approach to the sensitive parts—because of all this we have protection. We will lose virtual control over this and we will not have a right to protect them.

Not only that, after we go down to four bases and lose all U.S. jurisdiction and power, we become a guest presence, the defense is joint. I don't think that is generally understood. Even in the 22-year period defense is under a joint board consisting of an equal number of military officers, Panamanian and United States. There is not anybody in charge of the defense. There would be a board with equal numbers and we are in a host country. Our military forces would then be the same in status as those of our forces in Germany or Japan, for example. No authority to act. If there is any problem the host country decides that, not the United States. They would then be the sovereign and they would have total jurisdiction. They, depending on the attitude—and I have some observations to make about those attitudes this morning—would decide all questions. Defense and the protection of the protective devices and the alerting devices and the canal itself would be obviously greatly diminished from that which is the case now.

Senator LAXALT. How do you reconcile the statements in view of your position that sabotage is well nigh impossible in this situation with the statements that we hear from the administration to the effect that it would take from 50,000 to 100,000 troops in the event of terrorist activity to properly guard the canal?

Mr. BENDETSEN. The statements are utterly irreconcilable. It depends on what we are talking about or what the President was talking about when he said that if the treaty wasn't ratified he would defend the canal even if it would take 100,000 troops. Later that was raised to 200,000. There is no basis in military deployment analysis for 'either number. But neverthless, a major defense involvement in guerrilla warfare has been likened by the proponents to another Vietnam, is prophesied by the proponents if we do not yield. That is errant nonsense. There is no basis for such an assertion. That is, there is no such basis unless guerrilla action were given substantial and major outside materiel and personnel support in vast amounts by Cuba and the Soviet Union. Such a development as this would be out of the question entirely unless the Soviet Union, which wholly and absolutely controls Cuba, as our Government well knows, or should know, were prepared to risk World War III.

But if we are talkng about sabotage, efforts to disable the canal, which I understand to mean, then it would be extremely difficult to sabotage it and disable it under present conditions.

Now, if they, the Soviet Union and Cuba, wish to provide major support for the invasion of the Canal Zone with substantial guerrilla forces, organized guerrilla forces with major weapons systems, such a development could hardly be what the administration meant when it states that the Senate must ratify—or else.

So, I think these are overstatements based upon the very passionate attachment to the idea that we will enter a new era of cordial relations with Latin America and also that this will usher in a new era of cordial relations with the Republic of Panama, neither of which in my judgment have any real foundation.

But I do not think the statements are reconcilable. Attempted sabotage is one thing. Guerrilla warfare is another. But a major guerrilla warfare campaign such as we encountered in Vietnam could not be undertaken by Panama alone. Parenthetically, if others are to provide the means, the United States had better be organizing major counterinsurgency forces now—not a 200,000-man conventional force. If such happened, I think anyone would understand what the consequences of that would be for the world. If that is the threat then these proposed treaties certainly are not the answer to our problem. Appeasement and surrender have never led to peace. We would need to give priority and urgent attention to other measures.

Senator LAXALT. On the worst case basis then, you are stating, I gather, that Panama just does not have any potential capability to mount any realistic military force by way of guerrilla warfare or otherwise by itself; is that right?

Mr. BENDETSEN. If I may resort to the vernacular, they can raise a lot of hell but they cannot disable the canal for an extended period of time. The riots in 1964 were certainly not a pleasant experience for us. I think you will find from available intelligence sources that they were orchestrated also.

I do not think you can find any major riot that occurs spontaneously anywhere in the world.

KEY SECURITY ELIMINATED

Senator ALLEN. If the Senator will yield, let me ask you this. Is it not correct that under the agreements they are going to eliminate some 30 or 35 security positions which have worked with and do now work with the security devices for the canal?

Mr. BENDETSEN. I believe that is provided in one of the agreements in implementation of the treaty. I believe it is fair to say that if that were to come about it would tend to further expose this important facility, important waterway to sabotage.

DESTROYING CANAL WOULD DESTROY REVENUES

Senator ALLEN. You stated that top officials in Panama had threatened sabotage. If the treaties are given the consent of the Senate—we have not been asked for advice—would that not put Panama in a better position to give added threats of sabotage and would they not be in a better position to perform acts of sabotage under the treaties than they now have with us?

Mr. BENDETSEN. There is no question about that. I think it should be emphasized however that under present circumstances the operation of the canal provides about 25 percent of the gross national product of the Panamanian Republic. The citizens of Panama enjoy close to the highest standards of living of all of Latin America including Central America.

Senator ALLEN. From the canal operation?

Mr. BENDETSEN. Primarily because of the underlying major contribution to the gross national product, yes.

Panamanian businessmen do business in the zone. Some of them provide commercial support activity for operations of the zone. There are further opportunities for that.

But it would be rather inconceivable to me that the government could have an official policy of cutting off its nose to spite its face and destroying the canal and therefore destroying these revenues.

If they have some undisclosed agreement through the Havana-Castro axis and the Moscow axis that the Soviet Union will take care of them on the same basis as it is wholly supporting Cuba now with over $1 million a day in support, then I would not know about that. That would be a different matter.

RULING TRIUMVIRATE

But if that were the case and if we confirmed these treaties, and if the zone ceased to exist, and if the sovereignty would be indeed in the Panama Republic, and if they have secret understandings then sabotage would be far easier, it would be possible to disable the canal for long periods. In this case perhaps the Soviet Union would support Panama as she does Cuba. Surely under such a scenario the United States would not be in a position to restore the canal. So the risk is much greater if we confirm the treaties than it would be if we do not do so.

When England, France, and Israel attempted to force Egypt to fulfill its commitment, who interceded to prevent them from doing it? The United States did. You will remember that.

That prompted the real drive to get this canal some day.

Senator LAXALT. Wouldn't that be a gross violation of the terms of the treaty?

Mr. BENDETSEN. Of course, it would be a gross violation of the terms of the treaty. I do not suppose that that would prevent them from going through with it if they were willing to assess the calculated risk that they would be taking and go ahead. It has happened before.

I don't think the Soviet orbit has a well-established reputation for being bound by understandings and commitments and treaties. They did not keep any of those they made at Yalta and Potsdam after World War II in Eastern Europe.

Senator LAXALT. But we would have a proprietary interest of sorts under the conditions of the treaty until the year 2000. Do you think the Soviets or Castro would take that kind of risk to nationalize?

Mr. BENDETSEN. We have a fundamental interest in this waterway. We are about to propose to the Senate that it ratify a treaty which causes that interest to be unprotected very largely because we no longer control. We take on responsibility with no authority. That has never worked anywhere at any time when it has to work.

Senator LAXALT. Do you mean that under the terms of the treaty we have no authority between now and the year 2000?

Mr. BENDETSEN. None whatsoever. We would not be the sovereign. We are now. The treaty if confirmed would immediately end our authority, jurisdiction, and power.

The Canal Zone ceases to exist upon the coming into force of the proposed treaty.

What do we then have? Analogously I would describe this as a "management contract" to operate the canal for 22 years at our own expense. Unless tolls are substantially increased, there will be deficits on the backs of the U.S. taxpayers which will undoubtedly increase the deficit of the United States. We would pay the Panamanians $10 million a year to collect garbage and do other municipal functions. They have not had a lot of experience with that because we have had to collect it for most of the time since 1914 in Panama City, and elsewhere in their own country. But they will take it over. We pay them that.

We would pay them 30 cents a ton out of tolls. We would guarantee to pay them, above those amounts, $10 million a year which will be a fixed expense whether we earn it or not. Then we agree to pay them another $10 million out of earnings. But if it is not earned it is still an obligation, if you read the treaty carefully you will see that it is.

At the end of that time we will have paid them at least approximately $1,600,000,000 in 22 years. There are 1¼ million people in Panama. On a per capita basis that is $1,066 per person. If one would extrapolate that per capita payment into a comparable payment to the United States, I think you would find that it would be about $213 billion.

Proportionately that is what we are agreeing to. If at the end of the time the obligations that I have mentioned have not been earned or if the Panama Canal Commission, which is some sort of a vague entity which the Secretary of the Treasury seems to think has the power to borrow money from the United States does borrow the shortfall then this will further increase the national deficit, which will be monetized and added to inflation. All of this will be at the cost of and on the backs of U.S. taxpayers. They, the taxpayers, will absorb the unrecovered $6 billion U.S. investment in the Canal Zone. The whole plan is truly incredible.

Senator **Laxalt**. How do you reconcile that this country then is coming to the point where we have this treaty before us for U.S. Senate ratification in the offing when it appears on its face to be intolerable to the interest of this country? How do you explain that?

Mr. **Bendetsen**. It takes some undisclosed perspective. I cannot explain it unless there are reasons which have never been disclosed. If there are I cannot imagine any that would actually justify the adverse consequences.

Senator **Laxalt**. What would that perspective be in your estimation?

Mr. **Bendetsen**. There are the statements made by the proponents. I don't question their good faith. They must somehow believe what they say. I know many of them. Many with whom I have been acquainted for many years. They have a different perspective somehow. They have said that this will enhance our security.

Senator **Laxalt**. You have demonstrated pretty graphically that it does not. How do you explain it?

Mr. **Bendetsen**. I am at a loss to do so in the face of the facts, particularly in the face of the fact that the present Panamanian Government is dominated by Marxists. No Marxist can ever have any honorable intentions toward the United States although it is part of their game to lead us to believe that they do. They never do. To all Marxists—we, the United States, are the enemy.

DRUG TRAFFICKING BY PANAMA OFFICIALS

Senator **Allen**. I have one other question.

Do you know if there is any substance to the allegations that high officials in the Panamanian Government have engaged in criminal activities, possibly involving the trafficking in drugs within the United States? Do you have any knowledge of that?

Mr. **Bendetsen**. I have no personal knowledge and no direct information on any of this. I have seen in the Congressional Record a very serious report which I believe was filed by Senator Helms when he made those remarks under unanimous consent on the floor of the Senate. It looks very grim.

I know through hearsay in my various travels in Central America that this is something many people speak about. I have no personal knowledge of it.

Senator **Allen**. I see. We thank you very much and you may continue as you see fit.

Mr. **Bendetsen**. I would refer to whether these treaties would generate friendly relations with Panama. I quote from one of the members of the ruling triumvirate, Dr. Escobar, on August 12, when he was addressing the students at the university. You know that is an open university. Anybody can go there. A good many students are 45 or 50 years old. They don't have to graduate. It is quite a place for them to conduct their various activities.

The students were unhappy with the treaty because we would still have some sort of a presence there.

So he said:

> In the past when we set bombs against our oligarchy in Panama, and when we challenged the regimes established in our country, we never asked anyone

> for permission. You have never asked anyone for permission. When one wants a confrontation, one puts his knapsack on his back, his bomb at his waist and goes to stage the confrontation.

What he had to say to them about the pending treaty was simply this: "If you do not like some of the ugly features of it"—and those were his words—"go to it."

There is nothing in any of the treaties that could prevent Panama from doing what Egypt did in Suez.

The people who really run affairs in Panama are Marxist or associated with Marxists. They despise the United States. All Marxists do. Nothing will buy Panamanian friendship. Neither appeasement nor surrender nor money will buy it. The rulers hate us.

Senator LAXALT. Are you speaking purely of the Government and not the people?

Mr. BENDETSEN. Yes, of the ruling circle. I know many fine people in Panama. There are many fine people there.

Senator LAXALT. Are you saying the Government is so oriented in a Marxist direction that there is no way that we could ever buy their affection or good will?

Mr. BENDETSEN. I do not believe the good will of any nation can be bought. In the case of Marxist Socialists—the United States is the enemy and under all circumstances will remain so. From their viewpoint there can never be any reconciliation although they will stop at nothing to deceive us into believing that accommodation is possible. Many of our people in and out of our own Government are somehow so deceived.

In returning home from signing in the great Pan American Union, the proposed treaty, as Torrijos was flying over the skies of Cuba he sent a message to Castro. I quote it in English from the Spanish translation. This is on September 10.

> In returning to my country and flying over the sky of Cuba, I salute you with my everlasting friendship. I wish that the Cuban people under your well-aimed direction will continue its forward march toward progress. In Latin America, your name is associated with the sentiments of dignity that is channeled to the termination of all forms of shameful colonialism.

The friendly words of the Panamanian Government? Friendly to the United States, that is? I doubt it.

DEATH TO THE GRINGO

I have in my written statement something about what the Panama National Guard troops and their chant at the Fort Cimmaron training center. I put it in English. It is like an esprit de corps chant. It says: "Death to the gringo, down to the gringo, to the wall with the gringo." That is their chant and under the proposed treaty, defense is supposed to be joint. A friendly government? Joint defense?

We are assured that the canal is now obsolescent and will soon be obsolete. Our major *Nimitz* class aircraft carriers cannot transit it. We have one more *Nimitz* class nuclear carrier on the way. But all other future naval vessels are canal configured including those aircraft carriers of a new generation now being planned. All other naval ships, well over 95 percent, are canal configured.

SOVIET STRATEGY IN PANAMA

Perhaps it would be revealing if we considered what the Soviet view of the canal is.

I quote from a publication known as the Intelligence Digest published by Intelligence International, 17 Rodney Rd., Cheltenham, Gloucestershire, England.

I have read this publication for many years, and I have found it to be uniformly accurate.

> Perhaps the most revealing insight into communist strategy involving the Panama Canal has come from a Soviet Army officer, a Major Sergei Yuworov, writing in the official Soviet military organ "Red Star." As reproduced in the Cuban magazine "Bohemia," Major Yuworov wrote: "Due to its privileged location as the juncture between South America and the rest of the continent, including the canal that permits United States warships to operate simultaneously in the Atlantic and Pacific, it—the Canal Zone—must be considered by the Soviet Union as a priority zone. A second zone from which to attack Panama is the Central American Isthmus, located to the north of Panama. The canal itself can be attacked as well from Colombia." As a third choice, Yuworov points to "converting Cuba, and implicitly Puerto Rico, into bases from which Moscow's plan can be consummated."

I would like to refer to whom it is that we propose to surrender. We are surrendering to Escobar and his close colleagues. Torrijos was identified by Drew Pearson—and I quoted this in my extended statement—as a Marxist. He was raised in Veraguas Province. His parents were schoolteachers as reported but they were Marxist schoolteachers. They started the first Communist cell in Veraguas Province which is now the most powerful cell in Panama.

We certainly should not agree that we will refrain from negotiating for a canal elsewhere on the isthmus outside of Panama. It would be foolhardy to agree to and ratify such a provision. It would be foolhardy indeed to build another canal in Panama in any case.

Not only because of the nature of the Panamanian rulers but also because of the nature of the geology there. There is a vast amount of information on the latter aspect readily available to any qualified engineering commission to look at that.

I have grave doubts as to the allegations that this would generate, as Mr. Linowitz has frequently said, a new era of friendship and cordiality in Latin America.

Senator LAXALT. What is the extent of Mr. Linowitz' experience in Latin America?

Mr. BENDETSEN. I have known Mr. Linowitz for a number of years. He retired as chairman of the Xerox Corp. and upon retirement moved to Washington, D.C. He wishes to engage in some sort of public service. He was appointed representative to the Organization of American States. So far as I am informed, this is his primary experience with Latin American affairs. After his service as the U.S. representative to the Organization of American States, I seem to recall he chaired a Commission on Latin American Affairs. It was privately organized but its report was apparently given official recognition. Its report seemed to reach certain preordained conclusions as I see it.

I have heard various comments mentioned and have read in various publications allegations concerning a conflict of interest on the part of Mr. Linowitz in accepting appointment as negotiator with the rank of Ambassador to join Mr. Bunker in the negotiation of the pending treaties. The comments I have heard indicate that because Panama is alleged to owe substantial amounts of money to the Marine Midland Bank of New York, Mr. Linowitz, in serving as negotiator with the rank of Ambassador, may have been acting or allegedly was acting with the protection of the bank in mind so as to place Panama in a position to repay its debts.

There are a number of topics upon which we would not find ourselves in agreement but it is my opinion that he would not consciously engage in a conflict of interest such as has been alleged. It is my opinion further that Mr. Linowitz is sincere in his belief and opinion concerning this treaty and concerning his view that if the treaties are ratified, a new era of cordial and friendly relations between Panama and the United States will develop and over and beyond this with all of Latin America. It is my opinion that he believes this. I hasten to add that I do not as I have already testified along with my reasons for disagreeing with this view. But I cannot ascribe bad faith to Mr. Linowitz because I believe him to be a man of integrity however mistaken he may be in some of his conclusions, such as for example in this case.

Some of my Latin American friends wonder why he was appointed to negotiate this because they regard him as a sort of unilateral disarmament man. It is said that he thinks that perhaps the Soviets arm as much as they do because we do. I can't associate myself with that view either because the facts do not support.

WATERSHED OF PARAMOUNT IMPORTANCE

I would like to refer to the watershed. The canal lock system must have an abundant supply of fresh water. The watershed is made up of lakes in the Shagrus River. Two-thirds of it lies within the zone. One-third of it lies outside of the zone. The one-third of it that lies outside of the zone has been under unremitting attack from the Panamanian presence who live in the jungle in the agriculture areas there and is gradually being desertized. The flora is disappearing and the watershed will also disappear in that third of the land area that is involved.

Although the treaty provides for an environmental commission of equal numbers of Panamanians and United States people, it has no authority and cannot tell the Panamanian Government what to do if anything.

Everybody knows that the one-third of that watershed is important to the operation of the canal but Panama has not done anything about protecting it.

When this treaty goes into effect, the remaining two-thirds will be land area surrendered and ceded by the United States to Panamanian jurisdiction. The people will move into it just as they have in the other parts of the area.

The watershed will be in danger. If it is the canal will ultimately become, over a period of time, inoperable.

That is one point.

The next point I would like to make is the one about sabotage. If the land area is gone, then sabotage becomes feasible whereas now it is not very feasible.

The next point I would like to make is about the protocol of 1914 to the 1903 treaty. This protocol is expressly repealed if the main treaty is confirmed. That one in effect gave the United States full power to deny the use of Panamanian waters and canal waters to belligerent vessels.

In effects it modifies the provisions of the 1903 treaty regarding neutrality and to some extent—and I am informed with the tacit consent of Great Britain—it also modified the provisions of the second Hay Treaty of 1901 which provides for neutrality.

By the way, the words are close to those in the present proposed treaty in which it is claimed that we have the right to intervene and defend the canal in our own judgment.

No one has ever contended that Britain had the right to intervene in the Canal Zone since 1901 or 1914 when it was passed.

This protocol was adopted in 1914 when the canal was opened. It would be repealed.

Therefore, if this treaty goes into effect it would no longer have any treaty right to deny Panamanian waters and canal waters to belligerent vessels no matter whose they were.

Now I come to the next point. I will shortly summarize my views in this regard. We convey vast amounts of property and land. The Panama Railroad Company which is vital in emergencies in the operation of the canal is immediately transferred to the Panamanians. All of the land except the four military bases and the bases for dependent housing and the essential operating areas for our management contract, as I described it to you, to run the canal are ceded at once.

We also pay the amounts I have described. Ultimately it is a cumulative obligation for $70 million a year approximately.

TOLLS HAVE INCREASED 50 PERCENT IN 3 YEARS

You have already heard from the first witness that it would require increased tolls which have already been increased the past 3 years by 50 percent and further increases in tolls would probably not be justified in the opinion of many people with whom I have spoken. Therefore, it would be on the backs of the U.S. taxpayers.

There is nothing in the treaty to prevent the Panamanians from granting military bases to other nations. There is nothing in any of the treaties to prevent the Panamanians from granting naval bases or air bases to other nations. There is nothing there.

On July 16, 1977, when they were concluding the economic treaty in Panama with a Soviet representative a naval base for the Soviets was discussed and it was published in the press, as well as the sea-level canal to be financed by the Soviets.

It seems to me that we have all of the obligations and none of the benefits here. We provide the know-how, the canal, the expertise, and the treaty has the temerity to say that in order to provide a fair return on the resources committed by Panama to the efficient operation and maintenance of the canal. What resources? What management? All of these sums will be paid.

There are major amounts that are not disclosed in the treaty at all—about $345 million or thereabouts—they are probably told that they will never have to repay it.

PANAMANIANS TOLD NO NEED TO REPAY

Senator ALLEN. Excuse me just a moment. You state that they were told they would never have to repay it. We should go into that. I didn't catch the drift of that. Is that the loans from the Export-Import Bank and the OPEC business? The statement has been made by Mr. Linowitz of others——

Mr. BENDETSEN. No official statement has been made to that effect. This is Washington conversation. Perhaps I should not have referred to it in testimony before the committee. So far as I know, it cannot be proven except perhaps through secret documents. But some notice ought to be taken of the fact that it is alleged and maybe it could be determined by requiring testimony on that.

AMENDMENTS ESSENTIAL

But to conclude my testimony, Mr. Chairman, if the Senate in its wisdom believes for some reason that the canal should ultimately be turned over to the Panamanians for operation in the year 2000, then the treaty ought to be amended in a major way so as to keep the Canal Zone in existence until the transfer in the year 2000 in order to maintain the properties as they are and to maintain our jurisdiction so that we have some authority to fulfill the major responsibilities we undertake without them.

Senator HATCH. One of the questions that bothers me is this: There are many ambiguities in these treaties. It is difficult for me to see how any reasonable Senator would want to approve these treaties with all of the ambiguities in them.

One item in particular is that the treaties, as I read them, do not protect American interests if Panama decides it can no longer afford to keep the Canal Zone open or the canal open. What happens then? Do we lose all of the advantages that we and the other nations of the world enjoy?

Let's say that Panama takes over the canal and 5 years afterward Panama realizes that this is not the gold mine that they thought it was. You and I both know it is not a gold mine because we lost $7.2 million last year.

But let's say that 5 years from now that the canal is not producing revenue and the Panamanians see an economic advantage in shutting it down or, let's consider the possibility that they can't afford to operate it. What happens under these treaties in that event?

Mr. BENDETSEN. Let me answer your question in this way. During the 22 years it is all on us. We have to pay the bill.

Senator HATCH. That is not what Mr. Linowitz and Mr. Bunker have been telling people all over America. They are saying that we will never have to pay a dime because the tolls will be increased to take care of that.

Mr. BENDETSEN. I am sure you know, sir, that General Parfitt has expressed deep concern whether the toll revenue will meet the expenses and the payments which are required.

Senator HATCH. You are aware, of course, that Bunker, as well as the President and the State Department, have been telling the American people that the U.S. taxpayer will never have to come up with a dime.

Mr. Bendetsen. I think it would be well if the committee would consider calling on a number of officials of the Panama Canal Company, one of whom is in Texas now. I will provide the staff with his name. He was the comptroller and understands what the finances are. I think he perhaps would advise about his view. He has been through the ratemaking problem as a utility does. He has doubts and General Parfitt, the President of the Company, has doubts.

Senator Hatch. Everybody has doubts who knows anything about it xcept the President, the two Ambassadors, and the State Department epresentatives.

Mr. Bendetsen. And the representatives of the Speakers Bureau t the State Department will go at public expense to address groups round the United States saying the very same thing. You call them nd they will come with air fare and expenses paid. These statements re made.

I cannot reconcile them with such knowledge as I have.

Senator Hatch. You cannot reconcile them with the facts, can you?

Mr. Bendetsen. No.

Senator Hatch. Am I correct that the treaties do not require the anamanians to let us operate the canal during the next 22 years?

Mr. Bendetsen. If this treaty is ratified, we are out of the picture. e are there by a grant from Panama with responsibility to operate ut with no real authority to operate the canal. We have no longer ny legal presence or legal jurisdiction. Panama assumes plenary urisdiction. You know full well what that means.

Senator Hatch. Sure.

Mr. Bendetsen. Immediately upon the coming into force of the reaty that is the case.

I summarize this by saying that there are no good-faith provisions mposing obligations on Panama that I can recognize. The watershed s in danger if the Canal Zone ceases to exist as it will. There are no rovisions that Panama will not use the ceded land for military bases or other nations or Panamanian waters for naval bases for other ations or even air bases.

There are no provisions whatsoever that will guarantee that the atershed, without which the canal could not ultimately operate, ould be protected. We give them vast amounts of property including he Panama Railroad which is important to the operation of the canal.

They get it all. We are out except that for 22 years we have to foot he bill if the revenues do not meet the expenses.

Traffic is estimated to increase at 3.5 percent per year. If it does, doubt that that will be equal to inflation. I would hope that it would e, but I see no signs with the continuing deficits that we monetize in he United States that inflation will ever get down.

So, if that is the case, even if the tolls would otherwise pay the bills, hen it would start to fall behind because, if inflation is higher than hat, there will be a gap on that.

Senator Hatch. I apologize for interrupting you.

Last year it cost $253 million to operate the canal under our manageent.

Let's assume we accept the treaties today. What will it cost on an nnual basis to operate the canal, in your estimation, if these treaties re adopted?

Mr. BENDETSEN. It will cost at least as much as it did in the lates reported year of 1976. It cannot be any less.

Senator HATCH. Don't you believe that it is almost that?

BASES CHARGED TO DEFENSE APPROPRIATIONS ACT

Mr. BENDETSEN. The defense forces there are not charged to the revenues of the canal. That is in the Defense Appropriations Act. So the fact that we have only 4 military bases instead of 14 makes no difference there. The Panama Canal Commission takes over for the Panama Canal Company. Nothing else changes.

In all fairness, the $10 million we pay them to collect the garbage and so on and perform some other municipal functions, which they have not had a lot of experience in performing on that scale, we are paying now. So we have to pay that to them.

The payment which is estimated to be $40 million from 30 cents a ton with $10 million as a fixed annual expense charge. This will have to be paid whether earned or not. Another $10 million is to be paid each year if earned, but this is cumulative if the profit is not earned in a given year. So this too will have to be paid ultimately. It is analogous to the case of preferred stock dividends; when not earned, they cumulate.

As we raise the tolls, the marginal shipping that goes through will not continue to go through when the tolls reach the point of no return for them. So everything you say is correct. We cross the Rubicon and we cede our authority, jurisdiction, and our right to exercise sovereign power and we transfer most of the property outright including the railroad outright—free, but we remain responsible for operating the canal for 22 years at our expense.

So, there is no way without increasing tolls that the canal can meet its expenses. They were not met in 1976.

Senator HATCH. They increased it 45 percent over the last 3 years. How can we justify further increases without bankrupting some of the small states?

Mr. BENDETSEN. You are completely right. It is a little more than that. I don't see how it can be justified. Governor Pariff was quoted in the Wall Street Journal as saying and expressing his concern about that.

So, here is a watershed and here are properties immediately transferred free and here are responsibilities assumed without commensurate authority. It seems to me that if the Senate in its wisdom wants to give the canal to Panama in the year 2000, for reasons which escape me because you cannot buy friendship and you cannot buy cordial relationships anywhere with anybody either at home or abroad for that matter, then the Senate should require substantial amendments to the proposed treaty.

Senator ALLEN. I am sorry. Your testimony is perhaps the most interesting we have yet heard, but we must conclude our hearing accordance to the Senate rules.

We want to commend you, Mr. Bendetsen, for your very fine presentation. I recommend your testimony as a reference source to any person interested in the Panama Canal and in its possible disposition. I feel that your remarks will be used many times as a reference source.

I regret that you were not drafted to serve as one of our negotiators with your realistic and pragmatic approach to the problem and your great knowledge of the background of the canal and its actual operations under your chairmanship of the company.

I would also suggest to those who are opposing the approval of the canal treaties that if they could prevail upon you to make speeches throughout the country in some of our larger population centers and in some of our universities, then I believe that would go a long way toward shaping public opinion on this most important subject.

Mr. Bendetsen. I stand ready to do that.

Senator Allen. We do appreciate your testimony. You have been very helpful to the committee. I know that Senator Hatch and Senator Laxalt and myself and the membership of the entire committee and the Senate itself will have occasion many times to study your statement.

Mr. Bendetsen. May I request permission to submit a brief supplemental written statement for the record [1] summarizing my recommendations if the Senate does insist upon some new treaty with Panama. Those suggestions have not been brought up, they should certainly be considered, especially a proposal to defer the extinction of the Canal Zone until the year 2000.

Senator Allen. That will be fine.

Also if you would prepare some suggested amendments to the treaty for the committee's consideration for possible use on the floor of the Senate we would like to have that. It is the committee's understanding that if amendments are made by the Senate to the treaty then the treaty would have to be renegotiated—even if approved in amended form by the Senate—and thereafter presented as a new completed document for our consent; is that your understanding?

Mr. Bendetsen. Yes, sir.

Senator Allen. Senator Hatch?

Senator Hatch. I would like to ask Mr. Bendetsen to include in this a summary and analysis of the issue that has been raised concerning Sol Linowitz' alleged conflicts of interest—specifically his connections with the banking industry. Many people in this country are deeply concerned about this. I understand you have some knowledge that would cast light on this matter.

When I was in Panama the Minister of Planning and Economic Affairs admitted that Panama owed $1.4 billion to United States and foreign banks. Keep in mind that when Torrijos took over Panama's indebtedness was about a $169 million. But no one seems to know for certain the size of Panama's external debt. There are a number of estimates.

Mr. Bendetsen. I will undertake to verify the external debt and what part is owed the banks and what part is owed to international lending institutions.

Senator Hatch. I would also like to have your comments on Linowitz's alleged conflicts of interest.

Mr. Bendetsen. As to whether or not in fact he has been a director, Marine Midland Bank which is alleged to be one of the lenders?

Senator Hatch. I would like to have your opinion whether or not you found there is any real conflict of interest.

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[1] The referenced supplemental material is incorporated in the prepared statement submitted by Mr. Bendetsen.

Senator Allen. He may not want to respond to that.

Mr. Bendetsen. I have no independent knowledge on which to base a conclusion that there is indeed a basic conflict of interest.

Senator Hatch. Whatever you have we would be happy to have.

Mr. Bendetsen. I will certainly be glad to report anything that I can verify and which I know to be a fact.

Senator Hatch. That will be fine.

Mr. Bendetsen. I did refer at one point to what is common talk around town. I said this earlier before you came in, Senator Hatch. I cannot verify it. I think you will find this is my extended remarks. Maybe that would be something on which the committee might consider asking for testimony. It is common talk as to the independent financing not mentioned in the treaty that Panama will receive such as a loan from the Export-Import Bank and so on. They were assured informally that they wouldn't have to repay. I cannot verify that. But it is pretty common talk. There may be someone who could be put under oath to testify as to whether such assurances informally or otherwise were ever given.

Senator Hatch. There are a lot of people talking like that. Many advisedly call these sums "loans" and their repayment is called into question.

Senator Allen. We thank you very much, Mr. Bendetsen.

Captain Torrens, we thank you also for your fine testimony. We appreciate you both coming before the subcommittee.

The subcommittee stands adjourned.

[Whereupon, at 11:25 a.m., the subcommittee adjourned.]

[Prepared statement of Karl R. Bendetsen follows:]

THE FACTS ABOUT THE PROPOSED PANAMA TREATIES

A Summary of the Historical Background
An Analysis of the Consequences of Ratification

Separating Myth from Fact

By Karl R. Bendetsen
First Chairman, Panama Canal Company

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STATEMENT
RE
PROPOSED CANAL ZONE TREATIES
BY

KARL R. BENDETSEN

Prepared as the basis for testimony to be presented to certain subcommittees of the Senate Judiciary and Armed Services Committees.

I. INTRODUCTION

By way of introduction, between 1948 and 1952, I served as Under Secretary of the Army. Among my many duties was that of Chairman of the Panama Canal Company. By delegation from The President of the United States to the Secretary of the Army and from him to me, I was made the responsible agent for supervising the reorganization of the Canal Zone and its activities pursuant to an Act of Congress, Public Law 841, 81st Congress, 2nd Session (64 Stat.1038) approved September 26, 1950. This Act, adopted under the leadership of former Congressman Clark W. Thompson of Texas, constituted the first basic change in the permanent Canal operating organization from that originally established in 1914 pursuant to the Panama Canal Act of 1912.

Under the Act of 1912, in time of peace, the Canal was operated on an appropriations basis, under a single civilian agency as an interoceanic public utility headed by a governor. In war, that Act placed the Canal Zone and all of its functions under the supreme control of the Commanding General of the U.S. Army on the Isthmus.

The concept of the Act of 1950 was significantly different from that of the Act of 1912. A new corporation was chartered by the Congress known as the Panama Canal Company. The Panama Railroad Company, a New York corporation, was merged into the Panama Canal Company. The new company was placed under the control of a Board of Directors under a Chairman. The President of the Company became the general manager of business operations on the Isthmus. The Governor of the Canal Zone serves ex-officio, as President of the Canal Company.

The Panama Canal Company was charged with the operation of all of the transit, tollmaking, navigational and commercial activities on a self-sustaining basis. It became the sole taxpayer and was required under the Act to fund all governmental functions in the Zone which were strictly separated from the public utility functions.

Following my resignation as Under Secretary of the Army in the late fall of 1952, I was requested to remain as Chairman. This request was repeated by President Eisenhower in 1953 and I remained as Chairman until the end of that year when the pressure of my other obligations and those associated with the chairmanship of the Canal Company came into conflict, simply because of the unavailability of adequate time to do both.

I will first set forth briefly some important highlights bearing upon the historical background which culminated in the Isthmian Canal Convention between the United States of America and the Republic of Panama signed at Washington November 8, 1903. Having briefly described the streams of influence which converged in that Convention, I will then arrange a series of observations and comments relative to the pending Panama Canal Treaties.

Immediately upon ratification, and wholly without any consideration whatever, these treaties would:

(a) Extinguish United States jurisdiction in the Canal Zone;

(b) Terminate its juridical, legal and national presence there;

(c) Terminate the all-inherent rights of the United States under the 1903 Convention;

(d) Place all U.S. citizens there resident, including members of the Armed Forces of the United States and their dependents, under Panamanian jurisdiction;

(e) Convey all U.S. right, title and interest in all of the land and all of the fixed installations and property there except for certain temporarily excluded properties; and

(f) In thirty months, terminate all police power and all vestiges of governance, both executive and judicial.

II. HISTORICAL BACKGROUND

A. The Treaty of 1846 with Colombia (New Granada)

On December 12, 1846 at Bogotá, a new American chargé d'affaires, Benjamin Allen Bidlack of Wilkes Barre, Pennsylvania, acting entirely without instructions of any kind, on his own initiative, negotiated and signed a treaty. This treaty which he negotiated with the President of New Granada, Sr. Tomás Cipriano de Mosquera, proved to be critical and important. Its vital section was Article XXXV. Under the provisions of this Article, New Granada guaranteed to the United States the exclusive right of transit across the Isthmus of Panama (the State of Panama, a province of New Granada) "upon any modes of communication that now exist, or that may be hereafter constructed." In exchange, the United States guaranteed "positively and efficaciously" the "perfect neutrality" of the Isthmus and New Granada's rights of sovereignty there. It was this agreement by which the Panama Railroad was to be made possible.

The United States Senate did not act on ratification for a year and a half and then only when a new and special envoy was sent to Washington, the very able Pedro Alcantára Herrán to lobby for the agreement. The Bidlack Treaty, as it has been commonly called, was Bidlack's only diplomatic triumph. He died seven months after the treaty was ratified. Prior to Bidlack's appointment as an envoy to Bogotá, he had served briefly as a member of Congress.

B. The Discovery of Gold in California and the War with Spain

Although there were dreams and visions of a waterway connecting the Atlantic and Pacific Oceans through some pathway across the Isthmus connecting North and South America, Central America nevertheless remained a backwater until January of 1848, when gold was discovered in California at Sutter's Mill.

There were only three routes to California. They were the Plains across, the Horn around, or the Isthmus over. Thousands chose the "Isthmus over." It was a bruising experience. Many never made it at all - neither the men nor the mules. Uncounted men died of snakebite, cholera, yellow fever and malaria, and of a thousand hardships and miseries. But on they came. After all, it was 13,000 miles around the Horn from New York to San Francisco. It was 5,000 miles by way of the Isthmus. Those who went from New Orleans to San Francisco across the Isthmus were to save 9,000 miles.

So it was the discovery of gold in California that first heightened intensively the interest of the United States in a route across the Isthmus. Ultimately, however, it was not gold; it was the war with Spain and the dramatic voyage of the battleship Oregon from the west coast of the United States around the Horn. Our first true battleship, the Oregon, was in San Francisco when the Maine blew up in Havana harbor and victory in the Caribbean was said to depend on her. Every American was caught up in the excitement. She was a fine vessel and she got there in time to play a part in the Battle of Santiago Bay, but it took her almost seventy days. This was the great catalyst. But much was yet to happen.

C. The Panama Railroad

It was a man named John Lloyd Stephens who visited Nicaragua and the State of Panama. He became convinced that Panama was where the future lay. He organized the Panama Railroad Company, a New York corporation. The railroad was begun in 1850. It was finished five years later at a cost of $8 million, six times beyond anyone's estimate. It was the world's first transcontinental railroad, the most expensive line on earth. A one-way ticket at that time was $25 in gold. It was a bonanza.

Panama had been known as a pesthole since its earliest Spanish settlement. Horror stories came out of Panama as the railroad was pushed ahead. Probably more than 6,000 or maybe even twice that number died in the effort to build it. They died of cholera, dysentery, yellow fever, malaria, smallpox. There was then no cure known for any of them.

Thanks to Benjamin Bidlack and Article XXXV of his treaty, to U.S. initiative, the Isthmus at Panama was spanned. And the United States was obliged, as well as privileged, under the treaty to keep the railroad open and to protect it against all comers, by force of arms if need be. U.S. naval vessels customarily stood off at Colon and Panama City.

D. President Grant

Surprisingly to many who may still think that President Grant had no initiative, it was he who directed a series of practical investigations seeking to find the most advantageous route for an interoceanic canal. He considered such a canal absolutely essential to the future of the United States and of great benefit to the whole world. Grant authorized and directed under the leadership of Admiral Ammen (a friend since boyhood) seven expeditions to Central America between the years 1870 and 1875. Throughout the nineteenth century there had been many-theoretical and conjectural claimants to knowledge about where a canal should be built but none of them really knew what he was talking about. Remarkably however, as early as 1552, a Spanish priest designated Panama, Nicaragua, Darien and Tehuantepec as providing the best choices. Among these, he thought Panama and Nicaragua to be favored. The Grant expeditions were carefully done. President Grant commended to the people of the United States "An American Canal, on American soil."

E. The French Effort

Much has been written about the French effort led by Ferdinand de Lesseps. He was the hero of Suez, a sea-level canal bearing no real relationship to the gigantic problems at Panama. He organized an International Congress which met in Paris in 1879 to consider an Interoceanic Canal. The Congress wrestled with the problems of which route and whether it should be a sea-level or a lock canal. However, de Lesseps "railroaded" through a decision for a sea-level canal, despite the fact that a French engineer, Adolphe Godin de Lepinay, presented a plan for a lock canal which turned out to be almost exactly the precise canal which the United States ultimately built. It was his plan that was eventually adopted in 1906 by John F. Stevens, the Chief Engineer of the Isthmian Canal Commission appointed by President Theodore Roosevelt. Congress by an Act approved June 29, 1906 formally approved the recommendations of John Stevens after protracted and lively debate on the merits of Lepinay's concept.

The French effort collapsed in 1889 and the Panamanian Isthmus returned to the jungle.

F. The Canal at Panama was Second Choice

In 1899, the United States established the Isthmian Canal Commission for exploration purposes. Rear Admiral John G. Walker was President of the Commission. The objective was to recommend a route somewhere across the Isthmus as well as the type of canal to be built.

Nicaragua was recommended. It had popular support across the United States and very strong support in the Congress, particularly in the Senate under the leadership of then Senator Morgan.

G. The Spooner Act

A period of intensive struggle known as the Battle of the Routes was waged. Finally, however, Congress on June 28, 1902 passed the Spooner Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific Oceans. This Act favored the route across the Province of Panama.

The President of the United States was directed to acquire from the Republic of Colombia "perpetual control of a strip of land" not less than six miles in width from the Caribbean Sea to the Pacific Ocean and thereupon to excavate, construct and "perpetually maintain, operate and protect thereon a canal," which would afford convenient passage of ships of the greatest tonnage and draft then in use. The President was also directed to provide for the perpetual maintenance and operation of the Panama Railroad and to have "jurisdiction over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as may be necessary to preserve order and preserve the public health thereon and to establish judicial tribunals as may be agreed upon thereon as may be necessary to enforce such rules and regulations."

When the French effort collapsed, a new French company was created by the French to obtain what might be salvaged out of the wreckage of the French effort. The name of this company was the New Panama Canal Company (Compagnie Nouvelle). The Spooner Act provided in Section 3, that when the President had acquired the necessary territory for the United States from the Republic of Colombia, he was authorized to pay the French company $40 million for its rights and equipment and "to the Republic of Colombia such sum as shall have been agreed upon."

It is important to recall however that Section 4 of the Spooner Act provided for an alternative. If the President proved to be unable to obtain for the United States "control of the necessary territory of the Republic of Colombia" he, the President, was authorized to obtain control by treaty of the necessary territory from Costa Rica and Nicaragua for the construction and the perpetual maintenance, operation and protection of a canal via the Nicarague route.

There followed the adoption of the Spooner Act, after months of arduous negotiation between then Secretary of State Hay and Tomás Herrán, chargé d'affaires, a very favorable canal treaty for the United States. The treaty was concluded and signed January 22, 1903 and ratified by the United States Senate on March 17 of that year. Colombia did not act.

Communications between Washington, D.C. and Bogotá were difficult at best. It took three arduous weeks to reach Bogotá over land and the cable connection was intermittent. The Colombian Senate was called into session on June 20, 1903 to consider ratification of the treaty. However, things did not go smoothly and the Colombian Senate ultimately declined to ratify the treaty. One of the reasons not generally understood was because the rights of the New Panama Canal Company (Compagnie Nouvelle) were due to expire in the course of several months and the Colombians naturally had in mind that upon the expiration of those rights, Colombia would be eligible to receive the $40 million payment scheduled to go to the French company in addition to the $10 million specified in the pending treaty.

It is important to underscore here clearly that the treaty called for a payment of $10 million and an annuity of $250,000. Many people have called this annuity rent and many members of the State Department have currently so described the annual annuity as rent. It is not. The $250,000 payment was to be made in lieu of the annual annuity paid to Colombia by the Panama Railroad Company which was itself to be acquired by the United States. It is this same $250,000 annuity, later increased to $2,300,000 which has been paid to Panama.

There were a number of unfortunate misunderstandings between Colombia and the United States which also contributed to the rejection of the treaty. Herrán so devoted himself to bringing the ill-fated Colombia treaty to a successful conclusion that sheer exhaustion cost him his life.

H. Was the Panama Canal Treaty Forced upon Panama?

A great body of outrageous propaganda has been fabricated and a web of falsehoods has been spun by the Department of State and loudly declaimed by Panama's dictator, all designed to generate false impressions - impressions which many people erroneously entertain.

These false notions are that the Canal Zone was wrested from the Panamanians under duress; that U.S. Naval forces were brought to bear to obtain the treaty with Panama by which she ceded the Canal Zone in perpetuity. The State (or Province) of Panama seceded from Colombia eagerly and avidly. The leaders knew what they were doing. They sought their own enrichment and the vast benefits they knew would accrue to the new nation by selling and ceding the Zone in perpetuity. They were zealous in their efforts to dissuade the United States from dealing with Nicaragua and Costa Rica to acquire a Canal Zone and construct a canal across the Isthmus there. She seceded. The United States recognized the Republic of Panama. The United States sheltered and defended the fledgling Republic from Colombia after secession.

It is errant nonsense to contend that force was used against the State of Panama soon to become the Republic of Panama to secede from Colombia. It is total fabrication to assert that the Panamanians did not want the treaty.

It is true that Dr. Manuel Amador and Sr. Federico Boyd raised initial objections; it is true that Secretary of State Hay observed that there are provisions to which some Panamanians might object and it is also true that on behalf of Panama the treaty was not signed by a Panamanian. WHAT treaty between nations has ever been unanimously hailed? Very few. This one was unanimously ratified by the Panamanian Parliament before the United States Senate did - Amador and Boyd joined.

I. Was Panama Under Duress?

Eight men made the Republic of Panama. They were José Augustín Arango, Dr. Manuel Amador, Federico Boyd, Nicanor de Obarrio, Carlos C. Arosemena, Manual S. Espinosa, Tomás Arias, and Ricardo Arias. They knew that following the rejection by the Colombian Senate of the Treaty which had been negotiated with Colombia, the United States would switch rapidly and inexorably to the favored Nicaraguan route. These men, all citizens of Colombia resident in the State of Panama, desired for themselves and their associates the enormous and continuing benefits to be derived from the United States, from the payments that would be made, the mighty undertaking of construction and the successful operation of the canal. The first meeting of the movement to secede was held July 25, 1903. Following this, Arango, Amador and Arosemena became the nucleus of the conspiracy against Colombia. The people of Panama had a low regard for the government in Bogota.

It should be remembered that under the treaty with Colombia of 1846, pursuant to Article XXXV, the United States had a duty to guard the neutrality of the Panama Railroad. The conspirators never had direct word from any agent of the United States that if they conducted a revolution and seceded from Colombia they would be protected from an attack from Colombian troops, but they believed that this would be the case, as indeed it was.

On November 2, 1903, Commander Hubbard, the Captain of the U.S.S.Nashville, received secret and confidential orders via the American Consul at Colon to:

> "Maintain free and uninterrupted transit. If interruption threatens by armed force, occupy the line of the railroad. Prevent landing of any armed force with hostile intent, either government or insurgent, either in Colon, Portobello or other point. Send copy of instructions to the senior officer present at Panama on arrival of U.S.S.Boston. Have sent copy of instruction and have telegraphed Dixie to proceed with all possible dispatch from Kingston to Colon. Government force reported approaching Colon in vessels. Prevent their landing if in your judgment this would precipitate a conflict. Acknowledgment is required."

The uprising occurred at 6 p.m. on the evening of November 3, 1903. The presence of the ships of the United States standing off Panama and Colon prevented Colombia from retaking the Province of Panama. The Panamanians had seceded in order to obtain the Canal and the beneficence of the United States. No pressure had been applied to them at any time. No United States troops were landed. Some Colombian troops joined the rebels. The others voluntarily withdrew. There was no engagement. No shots were exchanged or fired.

The conspirators now having formed a provisional government designated Philippe Bunau-Varilla as their "Envoy Extraordinary and Minister Plenipotentiary near the Government of the United States of America." By November 8, 1903, he was installed in Washington ready to negotiate. The conspirators had designated Bunau-Varilla because they felt he was in a position to secure their objective. They were entirely correct. He served them well. They and he had a mutual interest in the outcome and so a pervasive understanding.

At the signing ceremonies of September 7, 1977, Torrijos observed of the 1903 treaty: "It was never signed by a Panamanian." - another blatant effort to generate false impressions and erroneous inference.

The treaty was signed by Secretary of State Hay and Bunau-Varilla November 18, 1903. Its text was cabled to the provisional government and also sent by ship. On November 26, 1903 the provisional government stated that the treaty would be ratified. It was unanimously approved by the provisional government of the New Republic of Panama on December 2, 1903, even though Amador and Boyd had previously and only temporarily been opposed to it for reasons which are not clear. The United States Senate ratified the treaty on February 23, 1904 by a vote of 66 to 14.

J. The Treaty

The United States was empowered to construct a canal through a zone ten miles in width. Colon and Panama City were not to be a part of the zone. However, sanitation, sewerage, water supply and maintenance of public order in these terminal cities were placed under United States control. Four little islands in the Bay of Panama - Perico, Naos, Culebra, and Flamenco - were granted to the United States. In addition, the United States had the right to expropriate any additional land or water areas "necessary and convenient" for the construction, operation, sanitation or defense of the Canal. In return, the United States guaranteed the independence of Panama. The treaty granted to the United States "all the rights, power and authority * * * which the United States would possess and exercise if it were the sovereign of the territory * * * to the exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." The State Department contends that this did not put the United States in the place of the sovereign. This amounts to stating that no nation - neither the Republic of Panama nor the United States is sovereign.

The questions of sovereignty and title were presented squarely before the United States Supreme Court in the case of Wilson vs. Shaw, 204 U.S.24 when it ruled on these questions. In its opinion, the Court stated inter alia: "It is hypercritical to contend that the title of the United States is imperfect and that the territory described does not belong to this nation * * *." The territory whereby the Canal Zone was ceded to the United States was ratified by an Act of Congress (33 Stat.2234).

The Panama Republic had been born under the protection of the United States. It brought the conspirators what they most wanted not only for themselves but for all the people of Panama. Manuel Amador, its first president, inaugurated February 20, 1904, presided over what he described as boom times and an end to centuries of plague. A new nation had been born free of debt. It was a nation with an endowment in the form of $10 million in gold. The government set aside $750,000 for working capital; $2 million for public works. Six million was invested profitably in first mortgages on New York City real estate, the income from which provided adequate revenues for the Republic.

CLEARLY THERE IS NO MORAL BASIS ON WHICH TO PREDICATE PANAMA'S DEMAND FOR SURRENDER OF THE CANAL ZONE AND TERMINATION OF THE 1903 TREATY. NEITHER PRESSURE NOR DURESS WAS APPLIED TO PANAMA. SHE GOT WHAT SHE AVIDLY SOUGHT AND HAS BENEFITED EVER SINCE. LET US NOW TURN TO AN ANALYSIS OF THE CONSEQUENCES IF THE PROPOSED TREATIES ARE RATIFIED.

III. THE PENDING TREATIES -THE PANAMA GOVERNMENT AND DEFENSE

A. What Would be Their Immediate Effect?

The American people thus far, to the extent that they have been informed at all, have been given the impression that the treaties would be gradual in application. In what amounts to the most important respect of all, in my opionin, this is not so.

If the Panama Canal treaties were to be ratified by the United States Senate, chief among the immediate results would be:

(1) Article I would provide that the Isthmian Canal Convention between the United States of America and the Republic of Panama signed in Washington November 18, 1903 would be immediately terminated and totally superseded. Whatever rights in and to the Canal Zone which the United States would have following the effective force of the treaty would rest entirely upon new and limited grants made by Panama to the United States.

(2) The United States would acknowledge the Republic of Panama as sovereign over the territory of what is now the Canal Zone.

(3) The Canal Zone would cease to exist.

(4) United States citizens in the former Canal Zone (employees, military personnel and their dependents) would no longer be under United States jurisdiction. All of them would be under the civil and criminal jurisdiction of Panama. Unless waived by Panama, offenses by any of them would be tried and upon conviction sentenced by Panama.

(5) The United States would cease to have police power in the former Canal Zone.

(6) All police, fire protection, street maintenance, street lighting, street cleaning, traffic management and garbage collection in the former Canal Zone will be provided by Panama. (United States pays ten million dollars per year for this, adjusted upward for inflation in Panama.)

(7) Defense of the Canal becomes joint under a combined Board of senior military officers of equal numbers of Panamanian and U.S. officers.

(8) The Panama Railroad and all other land and fixed properties (not specifically otherwise delineated in the implementary agreements for the life of the new treaty) become the absolute property of Panama at once.

(9) Article III provides that the Republic of Panama, as territorial sovereign, grants to the United States the rights to manage, operate and maintain the Panama Canal in accordance with the terms of the Panama Canal Treaty and its related agreements.

(10) Article XI provides that upon the coming into force of the treaty:

> "The Republic of Panama shall resume plenary jurisdiction over the former Canal Zone."
>
> During a 30-month transition period, Panama would permit the authorities of the United States to have the primary right to exercise criminal jurisdiction over United States citizen employees of the Panama Canal Commission and their employees and over members of the United States forces and civilian components and their dependents:

> (i) for an offense committed during the 30 months within the former Canal Zone and (ii) for any offense committed prior to the effectiveness of the treaty. For the 30-month transition period, the United States shall retain police authority and maintain a police force in the former Canal Zone. The courts may continue to function during the 30-month period except that such courts may not take any new civil cases but may only dispose of pending civil cases."

B. What About the Transfer of Property?

Article XIII provides that upon termination of the new treaty "The United States of America transfers, without charge, to the Republic of Panama, all right, title and interest the United States of America may have with respect to all real property including nonremovable improvements thereon, not already so transferred when the new treaty becomes effective."

The United States not only receives no compensation, it pays the Republic of Panama for having created the Canal. The treaty states that during the period the new treaty is in force, the United States will provide Panama with a "just and equitable return on the national resources which it has dedicated to the operation, maintenance, protection and defense of the Panama Canal." These payments from revenues require 30¢ per net ton adjusted upward for any increases in tolls over the years. This would amount to from $50 to $60 million per year. In addition, a fixed annuity of $10 million which will constitute a fixed expense of the Panama Canal Commission - over and beyond this, an annual amount of $10 million additional to the extent that operating revenues exceed the expenditures of the Panama Canal Commission. If in any year the expenses do exceed the revenues, this unpaid additional $10 million or any unpaid portion thereof is cumulative, and so that in any year when the operating surpluses exist, such surplus shall be applied to the cumulative backlog. WHAT PANAMANIAN RESOURCES?

C. What About Defense?

Article IV - Protection and Defense appears to stipulate that the United States during the life of the treaty has the primary responsibility to protect and defend the Canal. As stated above, defense is to be joint. It will NOT be as it is now.

The rights of the United States to station, train and move military forces within the Republic of Panama are very specifically limited by another agreement. This agreement is entitled "Agreement and Implementation of Article IV of the Panama Canal Treaty." This collateral agreement which is not called a treaty but which nevertheless would be carried into force by the treaty defines the legal status of our armed forces, the use of areas and installations and the movement of our forces.

With respect to our armed forces, Article VI of this collateral agreement provides inter alia the authorities of the Republic of Panama shall have criminal jurisdiction over the members of the Forces (U.S.Armed Forces), the civilian component thereof and their dependents. Within the perimeter of a defense site, offenses committed by such personnel which are criminal acts according to the United States law are by permission of the Republic of Panama subject to the United States. In other cases, Panama also would agree to waive, subject to review, criminal jurisdiction when an act committed off the base is solely against the property or security of the United States.

Acts committed off the base arising out of an official act or an omission in the course of an official act are subject to Panamanian criminal jurisdiction unless waived. The joint committee will review a certificate of the United States that such an offense was committed in line of duty but there is no provision as to what happens if the joint committee does not agree. Quite obviously, the offense would be subject to Panamanian criminal jurisdiction.

The agreement and implementation of Article IV with certain exceptions is not unlike agreements entered into by the United States governing "Status of Forces" with nations in which we have stationed our forces on bases in a host country, such as for example the Philippines or the Federal Republic of Germany, Italy or Spain, and to some extent the agreement with Japan. Such agreements can work only if the host country so wishes and so desires. In reading this long supplemental agreement of XXII Articles, it would require an exceptional abundance of goodwill on the part of Panamanians to work at all.

Some provisions such as Article XVIII are somewhat ludicrous, for example. It provides that the United States may furnish educational, sanitary and medical services to the members of its armed forces, their civilian components and dependents. For the most part, it is we who have undertaken to teach sanitation to the Panamanians and it is quite difficult to understand why on a military base for the duration of the main treaty it must be by permission. I do not think this is the case in other Status of Forces treaties, some of which in the past I have negotiated myself for the United States.

D. Other Defense Aspects of Importance

Of the fourteen military bases now in the Canal Zone, only four will remain available to the United States and these will be under direct Panamanian civil and political jurisdiction. As previously noted, Article IV of the agreement and implementation of Article IV of the treaty indicates that whereas the U.S. forces have responsibility for control of entry to defense sites, the Republic of Panama may share in the exercise of this control in a manner to be agreed upon in the Joint Committee. Any signs which delineate the existence of a defense site used by the United States are to be in English and Spanish and on each sign it will be necessary to say and state in both languages that "The sign is erected under the authority of the Republic of Panama."

The emplacement of any type of nuclear armament whatsoever is prohibited to the United States under paragraph 6 of Article IV of the agreement and implementation of Article IV of the treaty.

Even within defense sites, the Panamanian flag occupies the position of honor and is flown on each of them. Flying the flag of the United States is permitted but the joint committee will determine the manner of displaying the flags. At the entrance to a defense site, only the flag of Panama will be flown.

E. There is No Right to Intervene after Treaty Expiration

Much has been said by the State Department and by The President concerning long-term defenses. It has been unequivocably asserted that even following the expiration of the proposed new treaty, the United States will have the right to defend and protect the neutrality of the Canal. It is alleged that a grant of right to the United States to this effect is contained in the auxiliary agreement entitled "Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal." No such right is granted and no such right would exist authorizing the United States to intervene for the defense or the neutrality of the Canal after the pending treaty expires. All it says in this regard is found in Article IV: "The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this treaty, which shall be maintained in order that the Canal shall remain permanently neutral * * *."

F. What about Enemy Ships in Time of War?

Whereas now in time of war, as in the past, the United States could deny entry and passage of the vessels of any nations with whom we might be in a state of war, once this treaty and its collateral and subordinate agreements have been ratified, no such right will exist. The proposed agreements specifically authorize the passage of the vessels of war and auxiliary vessels of any and all nations in peace or war.

Dr. Romulo Escobar Bethancourt declares that the United States has no right to deny passage to an enemy vessel. He denies that the United States has any right to guarantee the neutrality of the Canal. He denies that the United States may say when the neutrality of the Canal has been violated. He stated publicly:

> "We did not want that with the excuse of neutrality, the United States would maintain a guarantee over the State of Panama. This was another cause of discussion that kept the negotiations detained until the United States gave up on the idea of having a guarantee of neutrality over the Canal."

United States officials say that we have some sort of an "understanding" with the Panamanians that Article IV means that the United States does have a "right." Dr. Escobar, the chief negotiator, and the real center of power in Panama says this is not so.

It will be recalled by many that Mr. Kissinger said that he had an understanding with the Soviets as to the meaning of a certain critical provision of the SALT I Treaty. It developed, however, that the Soviets denied that there was any such understanding and certainly did not restrain themselves from action respecting strategic weapons and missile sites that would have been a direct violation of the alleged "understanding."

G. Does this Treaty Generate Friendly Relations with Panama?

If we have opened up a new era of cordial relations with Panama, how is it that Dr. Escobar continues to defame and slander the United States before his own people in Panama at every conceivable opportunity? With combustible rhetoric he continually incites the students into confrontation and does so with regard to the period after the treaties take effect. He characterizes the United States as a reluctant and imperialist nation. On August 12, 1977, he advised these students that if they are disenchanted with what he described as some of the "ugly features" of the new treaties, they should strike out on their own. In this enlightening address, Dr. Escobar said to the students:

> "In the past when we set bombs against our oligarchy (in Panama), when we challenged the regimes established in our country, we never asked anyone for permission, you have never asked anyone for permission * * *. When one wants confrontation, one puts his knapsack on his back, his bomb at his waist and goes to stage the confrontation."

The United States personnel (military, civilian and dependents) will be totally subject to the sovereign power and jurisdiction of the Republic of Panama. Fixed installations and the property not temporarily and specifically otherwise designated will be immediately theirs.

There is nothing in any of the treaties that could possibly prevent the Panamanians from nationalizing the entire operation whenever it chose as did Egypt, contrary to its obligation in the case of Suez. When Britain, France and Israel undertook to enforce the commitments of Egypt, it was the United States that prevented these nations from so doing. We thus laid the foundation not only for what is happening to us now but for that which will lie ahead whenever the Panamanians consider it in their special interest to do so. The Panamanians largely despise the United States. They remember the precedent of Suez.

As noted, the treaty provides for joint defense under a joint Board composed of equal numbers of Panamanian and U.S. officers, No one is in command. As in all such cases, the host country which will also be the sovereign possesses the absolute power of decision. This would seem to place a high premium on friendly relations, shared objectives and philosophies, and an abundance of goodwill. IS IT THERE? Consider the following:

At Fort Cimmaron, there is a Panama National Guard Training Center. The soldiers in training have a chant. Perhaps for them, it is similar, for example, to the chant of U.S. Army Airborne units: "Airborne, Airborne All the Way." It is different, however, in Panama. It goes like this:

"QUE MUERA GRINGO
GRINGO ABAJO
GRINGO AL PAREDON"

translated into English, this means:

"DEATH TO THE GRINGO
DOWN WITH THE GRINGO
GRINGO TO THE WALL"

Mutual trust? Joint defense: A friendly climate with an abundance of goodwill?

When Torrijos was returning from the treaty signing ceremonies convened with such fanfare, he had something else on his mind other than a feeling of warmth and cooperative friendship with the United States. The English translation of a message sent to Castro as reported by the Spanish news agency on September 10, 1977 follows:

> "In returning to my country and flying over the sky of Cuba, I salute you with my everlasting friendship; I wish that the Cuban people under your well-aimed direction will continue its forward march towards progress. In Latin America, your name is associated with the sentiments of dignity that is channeled to the termination of all forms of shameful colonialism."

The friendly words of the hear of the Panamanian government? Friendly to the United States, that is?

IV. OTHER VITAL CONSIDERATIONS

A. We are Assured that the Canal is or Soon Will be Obsolete - NOT SO

We are soothingly assured that the Canal in reality is obsolete and really is not important to our security or our economy. It is true that our thirteen largest aircraft carriers cannot transit the Canal. All the rest of our surface and undersea naval ships can do so and plans for future construction of frigates, cruisers and destroyers will all remain canal-configured.

The Canal is one of the four vital choke points of the world. The Canal as a U.S. waterway which we are free to use and deny to our enemies in wartime gives the United States a striking, strategic advantage that Russia can never have. Geography dictates that the Soviets divide their navy into four separate fleets incapable of mutual support or reinforcement. Only between the Indian Ocean and the Mediterranean via the Suez Canal can the Soviets shift warships as they frequently do.

We have relied heavily on the Panama Canal in every serious military crisis of the century as a means of concentrating our fleet in areas of greatest danger. We need the anchorage facilities there that we now have. We need the airfields there.

I have heard it argued that it is obsolete because supertankers cannot transit the Canal. Supertankers? No supertanker can even enter any port of the United States. Supertankers were designed expressly to go around the Cape of Good Hope. If we were relegated to Drake Passage around Cape Horn or through the Straights of Magellan through the Tierra del Fuego, a very hazardous route, our defense would be impaired as would our sealane life lines. Our Alaskan oil will go through the Panama Canal. Very large tankers, in fact most of the tankers afloat in the world, can transit the Canal. The first Alaskan oil cargo will shortly transit the Canal.

B. What Do the Soviets Say About the Canal?

I quote from the edition of the Weekly Review of the Intelligence Digest of August 24, 1977 published by

Intelligence International Ltd., 17 Rodney Road, Cheltenham, Gloucestershire, England:

> "Perhaps the most revealing insight into Communist strategy involving the Panama Canal has come from a Soviet Army officer, a Major Sergei Yuworov, writing in the official Soviet military organ Red Star. As reproduced in the Cuban magazine Bohemia, Major Yuworov wrote: 'Due to its privileged location as the juncture between South America and the rest of the continent, including the Canal that permits United States warships to operate simultaneously in the Atlantic and Pacific, it - the Canal Zone - must be considered by the Soviet Union as a priority Zone. A second zone (from which to attack Panama) is the Central American Isthmus, located to the north of Panama. The Canal itself can be attacked as well from Colombia.' As a third choice, Yuworov points to 'converting Cuba, and implicitly Puerto Rico, into bases from which Moscow's plan can be consummated.' "

Quite a mouthful from a Soviet officer writing in the Red Army's official journal!

On the question of defense, it is absurd to say that by ceding the Canal to the Panamanians, our capacity for defending the Canal and guaranteeing its security will be increased. With the property in the hands of an irresponsible government or a government dominated by Marxists as Panama's government is, it could decide to close the Canal to our ships of war, to our navy, and where would we be then? The proposed treaty as already stated specifically permits the ships of a nation in a state of war with the United States to transit the Canal.

C. Will the New Treaty Protect From or Expose Canal to Sabotage?

One of the forcefully repeated arguments made by The President and the State Department is that if we do not surrender the Canal through this treaty, Panamanians will sabotage the Canal, whereas the new treaty will eliminate this hazard. Well, this type of reasoning should expose itself to real question. Sabotage by whom? There are far left radical students in Panama today who object to the proposed treaty and there was a crazed Panamanian in Stockholm who immolated himself simply because the treaty gives to the United States the right to manage it and underwrite the costs until 1999 and provides for a limited U.S. presence there. It is very difficult now to sabotage the Canal. It will not be difficult after the pending treaty is ratified and the Zone ceases to exist. It is almost impossible now. It will be easy if the treaty is ratified. Certainly after the treaty is approved, they would have a far better opportunity to sabotage the Canal than now when we give up substantially all of our police power in the Zone because there will be no Zone - it will all be Panama.

If Panamanians with or without the tacit approval of its Marxist-dominated government were to sabotage the Canal, it would cut off about 25% of Panama's gross national product. The indirect benefits flowing to Panama now are at this level. The Panamanians know that their livelihood depends upon the continued operation of the Canal as it stands now. Attempts at sabotage in the past have been thwarted by our own police and security forces which under this treaty we will no longer be able to maintain. So, in fact, for those radical students who consider the United States an imperialist power, as does Dr. Escobar, this treaty increases the opportunity for sabotage and surrenders a vital, strategic and tactical defense instrumentality of the United States which we cannot afford to surrender.

The Panamanians themselves have enjoyed nearly the highest standard of living on the average of any other nation in Latin or Central America due to the beneficence of the United States, and they know it. Most Panamanians who are fearful to speak out - they are afraid of their dictatorship - know that their government could not effectively operate the Canal anyway, but their lips are sealed by their fear.

D. Who is Omar Torrijos and How Did he Come to Power?

Omar Torrijos did not seize power from the old oligarchy nine years ago. That coup was led by Major Boris Martinez, a subordinate of Torrijos, who was kept innocent of the coup because of his excessive drinking problem. Major Martinez was an active, determined Communist.

When the Communist party of Panama, however, headed by Romulo Escobar Bethancourt, Juan Materno Vasquez and Marcellino Jaén decided on March 6, 1969 to purge Martinez, Jaén, who is married to Torrijos' sister Toya, persuaded Bethancourt and Vasquez to make Torrijos the head of the national guard, and later in 1972 the chief of government. Martinez was purged because he wanted to move too fast, faster than Bethancourt, the brains of the Communist party in Panama, thought they should move. He felt they could obtain much more by moving more slowly and not risk a countercoup.

Torrijos has been frequently described as the son of rural schoolteachers. This is correct. Both his mother, Joaquina, and his father, José, have been identified as founders of a Communist cell in Veraguas Province. It is now the most powerful and influential cell in Panama.

Omar Torrijos was a member of the Marxist organization of "Young Veraguas" when he attended the normal school of the Province of Veraguas. Drew Pearson on November 19, 1968 later identified him as a member of the Communist party of Panama. During July 1977, a Soviet economic mission to Panama confirmed a treaty establishing a free zone for the Soviet Union in Panama. A discussion took place at that meeting in which the Soviets stated they would consider financing and constructing a new sea-level canal for Panama across the Isthmus.

E. What About a Sea-Level Canal? Is One Needed for Defense?

Immediately after World War II, the idea of a sea-level canal was thought to have great urgency from a defense standpoint during the immediate reaction to the atomic bomb. Many studies since then have established that both a lock canal and a sea-level canal are obviously equally vulnerable to atomic attack and that both require extensive protection with air cover and sea forces, anti-submarine, surface and submarine. For all of this, we need the air fields in the Zone and we need the bases there over which we are surrendering control.

A sea-level canal across the Isthmus would be a foolhardy undertaking because of the geology of the Isthmus, let alone the nature of the Panama government. The uniquely intractable geologic formations were primarily the cause of the French collapse. It was only because of the superior capabilities and resources of the United States that we were able successfully to excavate the main channel known as the Culebra (Gaillard) cut. Not only that, it would be foolhardy to undertake it after this treaty goes into effect, if it does go into effect, given the characteristics of the Panamanian Marxist dictatorship with its axes with Moscow and Havana.

F. We Should Not Agree to Refrain from Negotiating for and Creating a New Canal in Nicaragua

What is even more foolhardy about the treaty if it is ratified is that we commit ourselves not to construct another canal between the oceans anywhere else during the life of the treaty. We also agree not to negotiate with any third state for a new route in the western hemisphere (Article XII).

If the United States were to undertake to establish a canal which would accommodate vessels of deeper draft and broader beam, it should be created in Nicaragua, not Panama. The geology is different and though the distance from shore to shore is longer, the land bridge is no longer than the narrow neck of the Panamanian Isthmus. In Nicaragua, either a sea-level or a lock canal could be built.

Because of the Pacific sea snake and other marine life indigenous to the Pacific Ocean, a sea-level canal might well imperil the important food fisheries of the Atlantic. There is no mixing of the seas now.

G. Would this Usher in a New Era of Cordial and Friendly Relations with all of the Nations of Latin America?

The President, Secretary Vance, negotiators Bunker and Linowitz and other spokesmen endlessly repeat the theme that the proposed treaties would establish an era of good feeling, of friendly, cordial and constructive relations with all of the nations of the western hemisphere. There is no doubt that this is in fact NOT so. These assertions have been made because of the presence in Washington for the signing ceremonies of most of the heads of government or chiefs of state of Latin America at President Carter's invitation extended through the Secretary General of the Organization of American States to attend the signing ceremony? Their presence is not evidence which supports these extravagant claims.

Only four Latin American states have supported Panama's demand for this treaty. Torrijos knows it too. He has so stated.

In May of 1977, very likely around May 15, twenty Mexican women journalists visited Panama and were received by Torrijos. Among these journalists was one, Marlise Simons, a Dutch journalist now living in Mexico City. Ms. Marlise Simons was once on the staff of the Washington Post.

On May 19, 1977, the Washington Post printed a byline article by Marlise Simons with regard to the mentioned interview with Torrijos. In it she quoted Torrijos as having stated to the twenty Mexican women journalists that he was supported by only four Latin American nations in his quest for the Panama Canal. He named them as Venezuela, Colombia, Costa Rica and Mexico.

The news stories of these twenty journalists were widely reported in the Latin American press.

It is well known that the chiefs of state and heads of government of our Latin American neighbors do not feel themselves in a position to have declined the President's invitation regardless of their feelings regarding the proposed treaty. To my knowledge, to my certain personal knowledge, there are several Latin American states, the governments of which are against these treaties. They can hardly bring themselves to believe that the United States government could bring itself to do this. They consider that it will foster an increase and not a decrease in terrorist and subversive activities in their own states. They consider that Panama and Cuba form an axis with Moscow. They consider that their own security will be diminished by these actions. I wish I could quote which nations, but it should be evident that

I am not in a position to do so. I should add that they consider that these treaties will be followed by an insistent demand on the part of Fidel Castro that the United States abandon its naval base in Guantanamo. When one has in mind the Soviet view of the Caribbean Sea, the Panama Canal, the entire Isthmus, we would do well to avoid any action which would increase the pressure on the United States to abandon Guantanamo.

They cite an article in the Washington Evening Star of twenty years ago in May of 1957 which carried a story that the Soviet Union had launched a propaganda offensive against the United States and Central America to incite Panama into demanding control of the Panama Canal. It worked.

They wonder why Linowitz was appointed as a negotiator in view of his general reputation as favoring unilateral disarmament by the United States.

When Bunker and Linowitz returned from Panama in triumph to be received by President Carter on a Sunday, it was later learned that the treaties had not yet been drafted, and that there were great complexities and difficulties with language translation that would take many days before the general agreements which had been initialed could be put into treaty language. Yet within a few days after their return, it was announced that The President had read every word of the treaties and stated that he was well satisfied. How could The President have read every word of nonexistent treaties?

According to the World Bank, Panama's external debt is in excess of $1,600 million. The rank and file of Panamanians have not benefited. Where has the money gone? Who are the principal lenders? And who did benefit?

In any event, Panama is close to bankruptcy. The proposal is that we yield to unjustified demands wholly devoid of any moral basis by a nearly bankrupt, Marxist-oriented, Communist-affiliated, Yankee-hating nation.

H. To Whom is it Proposed we Surrender?

Is the Senate of the United States familiar with the recent statement of Marcellino Jaén, a Marxist and a member of the ruling Marxist triumvirate who installed Omar Torrijos? He is, as it will be recalled from the foregoing, a brother-in-law of Omar Torrijos. On July 19, 1977 when Panama signed an economic pact with the Soviet Union, he stated publicly and I quote:

> "With the signing of this document that constitutes the final draft of an agreement in which the governments of the U.S.S.R. and Panama have participated, is an event of deep historic significance, not only for our country but for the American continent as well, who are always facing strong forces that represent a philosophy that is contrary to the destiny of Latin America."

Let us remember, it is not really Omar Torrijos, a man with a heavy drinking problem with whom we are dealing - it is Romulo Bethancourt Escobar, Marcellino Jaén and the Leninist-Marxist party of Panama supported by Cuban agents of Fidel Castro with whom we are dealing. It should also be noted that it was reported that during the negotiations with U.S.S.R. completed on July 19, 1977 as stated above, that there was an extended discussion on July 16, 1977 not only for the financing and construction for Panama of a new sea-level canal by the U.S.S.R. but also for the establishment of a Soviet naval base in Panama. In Article XII of the proposed treaty, it will be recalled, the United States may not negotiate with any other state to create a new canal. Panama undertakes NO reciprocal obligations.

We are frequently admonished that we must appease the Panamanian demands or face violence. In 1974, the then Ambassador of Panama to the United States said that if Panama is unsuccessful in its demand for the Canal and the Zone, "there will be no canal for anybody, not for us, not for the United States, not for the world."

Is it not clear that we propose to surrender in order to appease? In so doing, we do not enhance our security and defense - we critically impair both. And we would create conditions wherein sabotage would be easy, whereas it is difficult - next to impossible now except by a transiting vessel.

I. What About Colombia?

There are those who say that if any nation has a reason to be critical of the United States it is Colombia by reason of the events of 1903. What should be realized is that in 1922 the United States and Colombia amicably settled their differences in a treaty negotiated during the Wilson Administration. Under it, Colombia obtained certain transit rights through the Canal and it referred to the Canal Zone "title to which is now vested entirely and absolutely in the United States." Under that treaty, the United States paid Colombia $25 million in five annual installments as an indemnity for the loss of Panama in return for Colombia's agreement to recognize the independence of Panama. The $25 million was paid and accepted. Any legal question about our acquisition in 1903 was put permanently at rest. So also was any moral question.

J. Do We Pay Rent to Panama? Absolutely NOT

Members of the State Department and other government officials seeking to push the American people into a misunderstanding, hopefully to obtain ratification, cite as "proof" of the fact that the Canal Zone does not belong to the United States that the United States has always paid rent to Panama. The fact is - the Unites States is not and never has been obligated to pay rent. The $250,000 per year required by the original treaty of 1903 was in lieu of the $250,000 per year annuity which had been agreed to be paid to Colombia in the Hay-Herrán treaty, in consideration of the grant by Colombia to the United States of the right forever to operate the Panama Railroad. Inasmuch as the Panamanian conspirators who seceded from Colombia were aware of this, they expected and received not only the $10 million payment which Colombia would have received but also the $250,000 railroad operating annuity which Colombia would have received. The annuity over the years has been increased but it is not and never has been at any time rent. It is now $2.3 million.

. WHAT ABOUT THE WATERSHED WHICH IS ESSENTIAL TO THE OPERATION OF THE LOCK SYSTEM OF THE CANAL?

The canal lock system cannot operate without a constant and abundant supply of huge quantities of fresh water. These water sources are Madden, Miraflores and Gatun Lakes and the Chagres River. Protection of the watershed unquestionable and certain is indispensable to the future operations of the Canal. Without such assured protection, the requisite availability of vast amounts of flowing fresh water would vanish. Approximately two-thirds of this vital watershed lies in the Canal Zone itself. As you know, upon the coming into force of this pending treaty, the Canal Zone would wholly cease to exist and would become Panamanian property under its sovereignty and jurisdiction with small parts by permission of Panama set aside for use and occupancy by the United States in carrying out its "management contract" to operate the Canal until the year 2000 at the sole cost and expense of the United States.

The contiguous land area portion of this watershed lies outside the Zone in Panama. This important one-third portion of the watershed which lies outside of the Zone boundary has been virtually destroyed by a relentless assault on the flora. By whom? By Panamanian peasants and farmers living in these areas. The Government of Panama knows about this and does nothing about it. When the Canal Zone ceases to exist as it will, these assaults may well continue and be carried forward into the remaining two-thirds of the watershed. In that case, and there is nothing in the treaty to prohibit this, the jungle will disappear as it has in the other thirds and the Zonian two-thirds of this irreplaceable watershed will progressively become desertized as the contiguous one-third is becoming.

While Article VI entitled Protection of the Environment provides for a joint commission on the environment to be established with equal representation from both sides, the Commission only concerns itself with the implementation of certain provisions of the treaty and does not concern itself with that which would then be going on within Panama (in what was formerly the Canal Zone) as the implementation of the treaty by the parties relates only to those areas temporarily reserved for the use and occupancy of the United States for housing, for military bases, some training and for canal operations. This Article has no application specifically to the protection of the watershed, all of which will lie in Panama and none of which would come under the active care of either party once the treaty goes into force. These lakes and the river now in the Zone - those portions now in the Zone - would survive by themselves if left alone, but will not survive at all if they are treated in the same way as the portions of the watershed which have always been in Panama have been treated during the years since the Canal commenced operation. So the treaty has no protective environmental provisions in this regard - certainly no enforceable ones - and Article VI by its plain language clearly does not have this subject in mind.

L. WHAT ABOUT THE ALLEGATIONS OF THE VULNERABILITY OF THE PANAMA CANAL TO SABOTAGE OR THE THREATS OF SABOTAGE IF THE PROPOSED TREATY IS NOT RATIFIED?

On September 12, 1977, General Omar Torrijos said that the Canal "is as indefensible as a newborn baby." Is this true? The answer is "No, it is not true." Since 1942, the Canal has been provided with protective and with emergency devices capable of putting ships through the Canal even if every gate and every lock were to be destroyed. A bomb, a conventional bomb, that is, could not disrupt Canal traffic for an extended period of time. Neither could a ship which exploded within the locks stop traffic for extended periods. The dams also have special protection from outside attack. So long as the Canal Zone continues to exist, sabotage of the lock system is next to impossible in such a manner as to put the Canal out of commission for an extended period. When the Canal Zone ceases to exist, which it will upon the coming into force of this treaty, these protective devices will themselves become vulnerable. Present jurisdiction plus the included police power and the protective shield of the ten-mile wide zone are essential.

The treaty makes no provision for the continuation of the Zone in order to assure or more particularly to avoid the creation of a vulnerable situation which will arise when both the Zone and U.S. police power become extinct. The treaty, if approved, will extinguish both. This is a fatal flaw. Contrary to the contentions of the proponents, the continued existence of the Canal Zone and our jurisdiction assure the security of the Canal. The treaty will strip away that security and render the Canal vulnerable to the attack of saboteurs and terrorists.

M. THE PROTOCOL OF 1914 TO THE 1903 TREATY

If the proposed treaty is confirmed by the Senate, the United States will no longer have a treaty right to deny passage to belligerent ships. To the contrary, the United States will be obligated to allow such vessels to transit the Canal if they can reach its approaches. The United States now possesses that right and always until now considered it to be a valuable right. Soviet naval power is multiplying and over the last 25 years ours has been steadily diminishing both relatively and absolutely. Why would we then agree to forego this valuable treaty right?

On October 10, 1914, an agreement between Panama and the United States was signed whereby belligerent ships could be denied the use of Panamanian waters and Canal Zone waters. Ships using Panamanian waters would be denied the use of Canal Zone waters for ninety days. This would make more attractive to such belligerent vessels to sail around the Horn. This agreement indirectly had the effect of modifying the neutrality provisions of the 1903 treaty and I am told with the tacit consent of Britain with whom in 1901 the second Hay-Pauncefort Treaty superseded the first treaty upon assurance to Britain who surrendered her rights to construct a canal in return for a promise that ours would be neutral and open. I might add, by the way, that the words of neutrality in the 1901 Hay-Pauncefort Treaty with Britain are not dissimilar from those incorporated in the neutrality treaty which the Administration contends gives the U.S. the right to intervene in defense of the Canal after the year 2000. I have never heard anyone contend that the Hay-Pauncefort neutrality treaty with Britain in 1901 gave Britain the right to intervene in the Canal Zone which is U.S. territory. In an agreed minute to the principal pending treaty which minute has reference to paragraph 1(c) of Article I (covering abrogation of prior treaties and the establishment of a new relationship) this 1914 agreement would cease to exist. It would be expressly abrogated and the United States would lose its existing treaty rights whereby belligerent vessels can be denied the use both of Panamanian and Canal Zone waters. This is a very important treaty right which should be preserved and carried forward perpetually.

N. THE TRANSFERS OF PROPERTY AND THE PAYMENTS TO PANAMA

The proposed treaties would cede and surrender and transfer to Panama without consideration vast properties outright, including the Panama Railroad. This would be done immediately upon the coming into force of the principal treaty, if it is confirmed by the Senate. The Railroad is vital to Canal operations, maintenance and Canal emergencies. Also included in the immediate transfer to Panama and its sovereign jurisdiction to the exclusion of the United States would be all of the land areas of the Zone. These land areas which were ceded to the United States are U.S. territory subject to the exclusive right of the United States to exercise sovereignty over them. Not only that - lands within the Zone which was ceded by the 1903 treaty in perpetuity were later purchased by the United States from the individual Panamanian owners who owned land within the ten-mile wide Zone.

Between the coming into force of the treaty and the year 2000 and perpetually thereafter, all of these lands will belong to Panama from the beginning. The United States will have the use and occupancy, not the title, and no jurisdiction of limited small areas for housing and Canal transit operations in order to carry out "the management contract" which the United States undertakes in the form of this treaty - at its own sole cost and expense. The transfer of title is not delayed until the year 2000. The

Canal Zone immediately ceases to exist. We cede it lock, stock and barrel immediately. These valuable properties become Panama's free, including the important Panama Railroad which the United States should continue to operate so long as the United States has the obligation to operate. Certainly the Canal Zone as is in all respects, including U.S. jurisdiction, should remain intact until the year 2000.

Not only are lands an extensive operating asset given forthwith without any consideration whatsoever, but also under paragraph 4 of Article XIII, the United States is committed to pay annually over the 22-year period to Panama $60 million or more out of revenues and $10 million a year for the municipal services Panama will undertake to provide. This latter $10 million per year is indexed to the rate of Panamanian inflation! This paragraph goes on to say that all of this is "a just and equitable return."

These payments which could aggregate $1.6 billion over the 22-year period are in accordance with the treaties stated to be in addition to all of the other transfers of property which in and of themselves are made wholly without consideration to provide in accordance with paragraph 4 of Article XIII "a just and equitable return on the national resources which it [Panama] has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal * * * " What management? What operation? What maintenance? What protection and defense? It should be borne in mind that these required payments which are cumulative may not be generated from tolls because in the year 1976 after increases in tolls between 1974 and 1976 of approximately 50%, the operations were in deficit. Unless tolls are increased still further by substantial percentages, which would not seem to be justifiable, and the tolls do not generate the payments that Panama expects and the treaty provides, the deficit will be paid nevertheless by the U.S. Treasury.

This means, of course, it will be paid by U.S. taxpayers; by your constituents out there - in the south, in the midwest, in the mountain states, in the far west, in the northeast. These people already have to be either very rich or very poor even to be sick or to help send their sons and daughters to college today. Not only that, of course the investment of the United States in the Canal Zone, presently between $5 and $6 billion, will also be on the backs of the U.S. taxpayers - never to be recovered as was intended by Congress and promised to the American citizens by the Act of 1950.

Traffic through the Canal is estimated to grow at 3% to 3-1/2% per year. This percentage is very probably substantially below the rate of inflation which the United States will endure by reason of the monetization of the Federal deficits and therefore without substantial increases in toll rates, a growth of 3-1/2% per year in the volume of traffic would not ever overcome the current deficit which will be further increased by these cumulative payments which over time would aggregate $70 million per year. The treaty imposes upon the United States all of the burdens and accords none of the benefits. At the same time, it gravely impairs the security of the Canal, rendering it highly vulnerable to acts of sabotage whenever these seem to be in the interest of radical students of terrorists or of unstated Marxist reasons approved by Moscow.

There are no provisions to insure any sort of good faith performance upon the part of Panama. There are no adequate provisions to protect the operations there and adequately to secure the Canal during the 22-year period when the United States bears the burden at its own sole cost and expense under conditons wherein the United States assumes great responsibility but surrenders to Panama all of its authority. Panama becomes the exclusive sovereign over the entire area. It becomes the host country, the host nation. The United States has a management contract - responsibilities without commensurate authority which cannot be successfully discharged.

O. WHAT ABOUT THE ASSERTIONS THAT IF THIS TREATY IS NOT RATIFIED, THE UNITED STATES WILL FACE ANOTHER VIETNAM?

There have been repeated allegations from official sources in the Administration that the United States will face another Vietnam in Panama if the proposed treaty is not ratified. The President has stated that if the treaty is not ratified, he will defend the Canal Zone even if it requires 100,000 troops. At a later time, this figure was raised to a higher number. It was said that the Canal would be defended even if it requires 200,000 troops. Is there any validity to such allegation?

Panama is a relatively small country of approximately 1.5 million people. Its resources are limited. A major guerrilla war comparable to Vietnam is wholly beyond her resources. She could not mount such an operation unless she were to be substantially and continuously supplied with vast quantities of ammunition, weapon systems, communications equipment, an elaborate guerrilla command structure and huge numbers of personnel. These would have to be provided by another nation. Do the proponents of this treaty seriously assert that a major offensive of this nature would be launched against the U.S. Canal Zone, that is to say, against U.S. territory with the direct support of another nation or nations? By whom?

Is it not clear that if some other nation or nations provided the support for such a major attack upon U.S. territory that it would risk the beginning of World War III? Does it not seem that it is an imposition upon the citizens of the United States to induce them to support the Senate of the U.S. in ratifying the proposed treaty by suggesting that the United States will face another "Vietnam War" in Panama if it is not ratified?

P. THE PROPOSED TREATY CANNOT BE CONSIDERED IN ISOLATION FROM OUR PAST DEFEAT IN VIETNAM AND FROM OTHER ASPECTS OF U.S. CREDIBILITY

If we are induced to approve this treaty by a Marxist-dominated government, this would be another building block in the structure which the Soviets have been successfully and relentlessly erecting to fence in the United States and subject her to Soviet will. As every Russian knows, and as every member of the Politboro and Soviet Aparatchik believes devoutly, all non-Marxist social and governmental systems are anathema to the Soviet Union and the United States is the enemy. Somehow there are many people in the United States and seemingly within the government of the United States who apparently do not understand this. They do not understand or appreciate that we are at the mid-stage of a shift in relative power and influence to the Soviet Union that is of historic proportions, and which promises, unless arrested severely, to have enduring significance. The rise in Soviet standing in the world can be traced almost exclusively to the increase in relative Soviet military capabilities. She has projected her power through Cuba to Panama.

There are many other ways of dealing fairly and equitably with Panama as a neighboring state, short of immediately surrendering the U.S. territory embodied in the Canal Zone and simultaneously terminating our jurisdiction there.

If we are induced by the will-o'-the-wisp of wishful thinking that Marxists can ever be appeased by the proposed treaty or by anything less than our surrender to their will, we will have crossed the rubicon and will expose the Canal to whatever may be the Marxist design. Whether ratification is approved or refused will make no difference in Marxist objectives and designs. However, it will make a quantum favorable difference in the capacity of the United States to retain its independence if ratification is declined. The United States will have the respect of most of the nations in the western hemisphere and of western Europe and of our allies in the far east if we otherwise deal fairly and equitably with Panama while declining absolutely to surrender our territory as proposed by the pending treaties in reliance upon Marxist promises.

The proposed treaty is wholly against our national interest. The consequences will be wholly adverse. There is no such thing as world opinion. On the other hand we are being closely watched by our remaining friends and allies. To them the proposed treaty cannot be brewed in isolation. If confirmed, it will be viewed by friends, neutrals and foes alike as yet another U.S. surrender. No observer will regard it as an act of noble purpose and of magnanimity.

Q. IF THE CANAL IS TO BE TRANSFERRED TO PANAMA ON DECEMBER 31, 1999 CERTAIN AMENDMENTS ARE ESSENTIAL

If the Senate in its wisdom ultimately decides that the Canal should be nevertheless transferred to Panama at the end of 1999, then these considerations are vital:

First, that the watershed be protected;

Second, the necessity for providing protection of the Canal from sabotage and acts of terrorism;

Third, the maintenance of the right to deny passage to belligerent ships;

Fourth, the necessity that the United States be free to negotiate for and build a canal elsewhere on the Isthmus;

Fifth, the requirement that the United States have authority commensurate with its responsibility between now and the end of 1999 which in turn requires that the Canal Zone and U.S. protection continue to exist until then. Neither the Canal Zone nor any of the fixed or operating properties should be given to Panama until the end of the 20th century.

Meanwhile, progressive measures would be taken to train and employ Panamanians so that at the end of the century Panama would man all positions and be in a position to take over. At that time, U.S. protection would come to and end. The Zone would be extinguished. All properties would be conveyed. Thereafter, the United States should be prepared to accept the Canal at risk and whatever other consequences might ensue. With these considerations in mine, the treaties should be amended as follows:

1. No transfers of jurisdiction, authority or property should occur until December 31, 1999 and the Canal Zone should remain intact, with all and in full the properties and the facilities, under the authority of the United States to the exclusion of the exercise of jurisdictional authority by Panama during the 22-year transitional period.

2. During this period and until December 31, 1999, the 1903 treaty as amended by amendatory treaties, minutes, notes, understandings and executive agreements prior to the signing

of the proposed treaties and their minutes, notes and subordinate agreements would remain in full force and effect.

3. The treaties should be amended further to provide that Panama agrees that she will not grant or accord to any other nation any military, naval or air bases in Panama or in Panamanian waters and that she will not permit the stationing of naval, air or military forces or of quasi or paramilitary forces of any other nation in Panama or of such individuals or units, other than individual diplomatic personnel, except as agreed to by the United States during the transition period ending December 31, 1999.

4. Article XII, paragraph 2(b) should be deleted. The United States should be free to negotiate for and build an Isthmian Canal if it so desires outside of Panama.

5. The neutrality treaty should be amended to make clear that the United States may take such measures as it believes necessary for the defense of the Canal at any time after the year 2000 and to this end as in the case with other friendly countries, Panama should in the mutual defense interest of the parties, provide after the year 2000 air, naval and military bases in order to give meaning to the defense of the Canal following its surrender at the start of the year 2000.

6. The treaties should be further amended for the payment of an increased annuity to Panama during the transition period but no other payments should be made. Accordingly, Article XIII, paragraph 4, should be deleted.

7. Specifically, the protocol of 1914 which provides the United States with treaty rights to deny belligerent ships of any class or nature, whether warships supporting logistic ships, maintenance ships, fleet trains, etc. the use of the waters of Panama and of the Canal, should remain in full force and effect. To this end, the treaty should be amended so as to strike the provisions by amending Article I, paragraph 1, as follows:

   Strike the words "Upon its entry into force," and substitute therefor "On January 1, 2000."

   Strike Articles III, IV, V, VII, VIII, IX.

   Amend Article X by striking paragraph 1 thereof and substituting therefor the following: "During the transition period ending December 31, 1999, the United States agrees to provide for an orderly phasing-in to all positions of Panamanians so that as of January 1, 2000 all operations will be conducted by Panama and by Panamanian employees or other personnel hired by Panama. To this end, the United States will progressively establish during the transition period employment and labor regulations which will contain terms, conditions and prerequisites for all categories of employees of the Panama Canal Company whose positions will be fully absorbed when the Panama Canal Company ceases to exist on January 1, 2000."

The foregoing amendments necessitate in addition that the following additional amendments be made in order that all remaining provisions be compatible with each other:

Strike Paragraph 8 of Article X

Strike from Paragraph 9 of Article X the words "Panama Canal Commission" wherever it appears therein or elsewhere in the treaty and substitute "Panama Canal Company."

Strike Article XI

Strike Article XII

Strike Article XIII

8. Add an additional Article providing that all minutes, executive agreements, implementation agreements, letters of understanding and all other understandings associated with the pending treaties, including the agreements and implementation of Article III and Article IV are to be set forth in detail as an attachment to the proposed treaties and incorporated by reference in the Panama Canal Treaty so that any and all amendments to any of the foregoing will require the advice and consent of the Senate of the United States of America.

V. RECAPITULATION

A. While the treaty of 1903 was not signed by a Panamanian as Torrijos stated during the signing ceremonies in the Pan American Union on September 7, 1977, it was signed by a duly appointed Minister Extraordinary and Plenipotentiary designated by the government of the New Republic of Panama, namely Philippe Bunau-Varilla. The Panamanian government ratified the treaty December 2, 1903. The United States Senate did not ratify it until February 23, 1904.

B. Thereafter, Tomás Arias, the Secretary of the new government of Panama sent a note to the United States government:

> "The Government of the Republic of Panama considers that upon the exchange of ratifications on February 26, 1904 of the treaty for opening an inter-oceanic canal across the Isthmus of Panama, its jurisdiction ceased over the Zone."

C. As cited above, in 1907 the U.S. Supreme Court ruled that the Canal Zone was "ceded" and that the United States owned it absolutely.

D. The presence of the U.S. Naval forces off of Colon and Panama City were to prevent the landing of Colombian troops. No United States troops were landed. Panama was neither under duress nor coerced. It sought independence and avidly sought the treaty. In fact, some Colombian troops joined the Panamanians.

E. In 1936 and 1955, the 1903 treaty was expressly reaffirmed in further treaties which made certain minor adjustments to the treaty of 1903. The amendatory treaties were duly ratified.

F. One expects remarks from Torrijos such as he made during the September signing ceremonies that "United States recognized the need to correct an error instead of prolonging for an eternity an injustice and to correct an historical mistake." This is the kind of language he uses to fire up his people.

What error? What injustice? What historical mistake?

Where would Panama be today were it not for the events of 1903? Probably still a part of Colombia. If thinking Panamanians were really aware of their history, they would feel gratitude toward the United States. Both Panama and Colombia have derived tremendous benefits from the Canal. So has the rest of the world.

G. Shortly after the Wilson Treaty with Colombia mentioned above which was not ratified until 1922, and sometime during 1923, Charles Evans Hughes, then Secretary of State, said

> "It is an absolute futility for the Panamanian government to expect any American administration, no matter what it is, any President, or any Secretary of State, ever to surrender any part of these rights which the United States has acquired under the treaty of 1903."

H. Closing Summary

Congress in 1902 in the Spooner Act empowered President Roosevelt to acquire from Colombia land across the Isthmus of Panama for a ship canal if Colombia would grant perpetual control.

A treaty for a 10-mile wide zone was negotiated by the plenipotentiaries of Colombia and the United States but the Colombian Senate rejected the treaty in August of 1903 for several reasons cited heretofore. Later on, when it was too late, Colombia wanted to accept it.

On November 3, 1903, Panama, a restless province of Colombia, started a revolution, wholly bloodless as it turned out. President Roosevelt, to protect the Panama Railroad and to protect American citizens from imminent violence, kept Colombian troops at a distance with a nearby show of gunboats and marines. No United States forces were landed. Some Colombian troops joined the revolution.

A new Panamanian government was formed on November 4, 1903. Two days later, on November 6, 1903, Secretary of State John Hay officially recognized the Republic of Panama. No pressure whatsoever or of any kind had been put upon Panama by the United States.

On November 18, 1903, Secretary Hay concluded and signed a treaty with the Panamanian Minister Extraordinary and Plenipotentiary in Washington, D.C. on substantially the same terms and on identical money terms previously offered Colombia. It guaranteed the independence of Panama.

The treaty was unanimously ratified by the new Panamanian government on December 3, 1903; the U.S. Senate gave its advice and consent to the treaty on February 23, 1904.

> The United States under the treaty paid $10 million for the 10-mile wide zone across the Isthmus and an annuity for the right to operate the Panama Railroad (as explained heretofore - not in any sense rent) of $250,000. This annuity was increased in a 1955 treaty to $2,300,000. The treaty describes the zone as "lands granted" to the United States. Panama has repeatedly stated that the zone was "ceded."
>
> The U.S. Supreme Court in 1907 ruled the Canal Zone was ceded and that the United States had perfect title.
>
> Under Articles VI and XV of the 1903 treaty through a Joint Commission, the United States bought the land from the owners of the land within the Zone and acquired title in all cases in fee simple. Substantial amounts of money were paid to these owners.
>
> Having first rendered the disease-infected Canal Zone habitable by a three-year sanitation program that conquered both the death-dealing yellow fever and malaria (largely) the United States completed the Canal in 1914 at a then cost of $366,650,000. The first ship passed on August 3, 1915. The United States has an investment there now of approximately $6 billion.
>
> In 1922, Colombia, the nation that felt aggrieved by the events of 1903, made a complete settlement fully adjusting all differences in a treaty negotiated during the Wilson administration and ratified in 1922 for which the United States paid Colombia $25 million.

Before closing, I comment on the report concerning the alleged bugging of the Panamanian negotiations. There was no finding that such did NOT occur. If it did and if pressure was applied by the Panamanians to Bunker and Linowitz upon discovery of the bugging by the Panamanians, who could be naive enough to suppose that either Bunker or Linowitz would reveal that they have been blackmailed into proposing the pending treaties and implementing agreements in their present form? Incidentally, the latter can be freely amended so as to modify the treaties themselves once the treaties are ratified.

During his 1976 campaign, President, then candidate, Jimmy Carter, stated unequivocally:

> "I would never give up complete control or practical control of the Panama Canal Zone."

The proposed treaties would immediately extinguish all U.S. control, practical or other. Panama would forthwith become the sovereign, exercising all sovereign power and control. Sovereign power and control are inseparable. If we surrender power as the treaty provides, we lose control.

In effect, we have a management contract at our expense for the next 22 years with the same responsibilities we now have for canal operations but with no control or authority. The latter would be vested in the host country - Panama - as it always is. Over that period, we have the privilege of disbursing to them somewhere between $70 and $80 million per year while underwriting all costs of operation, maintenance, repair and rehabilitation. Over and beyond these amounts, collateral agreements not covered by the treaties for economic aid and other purposes could, over the 22-year span, aggregate as much as $2.2 billion. Panama's population is 1.5 million. This aggregate would approximate nearly $1467 per capita for each Panamanian. On a per capita basis for the United States, this would be the equivalent of a payment of $322 billion.

Arguments that technically the United States is not the sovereign, notwithstanding that it now possesses in perpetuity the exclusive right to exercise sovereign power (to the exclusion of the exercise of such power by Panama) are meaningless and border on the absurd. These arguments are neither germane nor sensible. Unless the present power of the United States over the Canal Zone (and therefore over the Canal itself) remains undiminished, the government of the United States would place itself in the untenable position of accepting responsibility without authority. This we must not do. There can be no compromise here. It would not work. It never has whenever it is required to work.

The proponents contend that the language in the neutrality treaty which states that the parties will maintain "the regime of neutrality" gives the United States the right of intervention if necessary. These words are similar to those of the Hay-Pauncefort Treaty of 1901 between Great Britain and the United States. No one has ever contended that this gave rise to any British intervention rights. And as noted hereinbefore, Dr. Escobar flatly denies that the words confer on the United States any such rights and he also flatly denies that the United States may decide what would constitute a breach of neutrality. In the premises, the word "neutrality" in

Panamanian eyes would apply to everybody as the treaty itself states. So that the Soviets or their proxies, the Cubans, can be provided with naval base facilities at Colon or Panama City or both, and Panama undertakes no obligation not to be "neutral" in favor of Cuba and the U.S.S.R. Soviet naval facilities in Panama were discussed as recently as July 16, 1977 as hereinbefore mentioned, while the Soviet delegation was in Panama to conclude an economic treaty with Panama - naval facilities and a sea-level canal.

The real issue, the real choice, is whether we should stay or leave altogether. The answer should be clear. We cannot leave. We cannot surrender in the face of threats and duress even if there were an explosion if the treaties are not confirmed. But there will also be violence if the treaties are confirmed. The Panamanian radicals, encouraged by Escobar, promise this already. United States influence in this vital area is seriously impaired by the extension of Communist power and influence outward from Cuba and by our past defeats and retreats. The western world and our allies in the far east already doubt our resolve and will to defend ourselves. And so too, perhaps, do the Soviets.

There is ample room to deal fairly and equitably with other but much less important problems on the Isthmus without these treaties.

KARL R. BENDETSEN
2918 GARFIELD TERRACE, N.W.
WASHINGTON, D.C. 20008

November 17, 1977

The Honorable James B. Allen
6205 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Allen:

Recently Omar Torrijos of Panama staged a propaganda show. He offered to resign if this "sacrifice" would sway the U.S. Senate to believe that such action would somehow convert the proposed treaties from a large minus to a discernible plus. He also proposed to "restore" freedom to the censored Panama press.

To anyone who is accurately informed concerning the true nature of the Panama government, these gestures, calculated as they are to deceive, would constitute an insult to his intelligence.

Sadly however, the wall of deliberate myth which has been erected around the Marxist government of Panama has obscured from a majority of U.S. citizens, as well as from many of our Senators, a clear perception of the nature of that government. Total power is held behind the scene. It is primarily held by Senors Vasquez, Escobar and Jaén - Marxists all. It is they who were instrumental in installing Torrijos after they removed Martinez. The latter was the first dictator who took power upon the ousting of Arnulfo Arias. He is the constitutionally elected President of Panama. He has been exiled by the Marxists but he was elected by the largest majority ever received by a Panamanian president.

If this ruse works to obtain Senate ratification, it will be a pity and another bad day for the United States. Certainly Torrijos or some other dictator would shortly be installed. No freely elected government could be. Free elections in Panama are an impossibility.

And those who possess the power to "restore" or to "return" to the press its freedom will not have yielded the power to extinguish it again. The majority of Panamanians want a freely elected government. There is no way for them to establish one so long as Panama remains in the grip of those who behind the scene possess the power. The majority of Panamanians DO NOT want the U.S. Senate to ratify these treaties. This they do not want because ratification would perpetuate Panama's brutal Marxist dictatorship.

There will be those who ask: "But what about the plebiscite?" Yes, there was a plebiscite and there were observers there. They reported that the voting was free and open. If there was any unseen pressure, one may be certain that it was to get out the vote. Most of the "NO" votes were Escobar's radical students. They want the United States totally ejected at once. They will still want that if the treaties are ratified. Most of the "YES" votes were cast under duress, the duress of a brutal dictatorship and the consequent fear of its reprisals.

Sincerely,

PANAMA CANAL TREATY (DISPOSITION OF UNITED STATES TERRITORY)

THURSDAY, NOVEMBER 3, 1977

U.S. Senate,
Subcommittee on Separation of Powers,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 1318, Dirksen Senate Office Building, Senator James B. Allen of Alabama (chairman of the subcommittee) presiding.

Present: Senator Hatch of Utah.

Staff present: Quentin Crommelin, Jr., chief counsel and staff director; Dr. James McClellan, professional staff (minority); and Melinda Campbell, chief clerk.

OPENING STATEMENT OF SENATOR ALLEN

Senator Allen. The subcommittee will come to order.

The Subcommittee on Separation of Powers convenes to continue its investigation of certain constitutional questions involved in the negotiations conducted by the executive branch for the transfer of U.S. territory and property in the Isthmus of Panama to the Republic of Panama.

Also subject to the investigation of the committee are financial arrangements apparently concluded in executive agreements made outside the context of the proposed Panama Canal Treaties. These extrinsic financial arrangements also appear to violate the doctrine of separation of powers, inasmuch as they deny to the Senate the right to give advice and consent to all aspects of the new proposed treaty arrangements with Panama.

In conducting its review of these two major constitutional issues, the committee has been privileged to hear from a variety of knowledgeable witnesses both in the relevant areas of constitutional law and with respect to the factual backdrop against which these constitutional matters must be resolved.

Today the committee is especially honored to hear the testimony of Prof. Raoul Berger of the Harvard Law School and to receive for the record the written testimony of Prof. Charles E. Rice of the Notre Dame School of Law.

Without objection, the testimony of Professor Rice will be inserted in the record at this point.

[Material follows:]

STATEMENT OF CHARLES E. RICE, PROFESSOR OF LAW
UNIVERSITY OF NOTRE DAME LAW SCHOOL, BEFORE THE
COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE,
NOVEMBER 3, 1977

It is clear that the property ceded by the United States in the Panama Canal Treaty is "Territory or other Property belonging to the United States", within the meaning of Art. IV, Sec. 3, cl.2, of the Constitution.

Article 2 of the 1903 treaty between the United States and the Republic of Panama "grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal." Article 3 of that treaty "grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters were located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

It is interesting to compare the language of the 1903 treaty with the earlier treaty of 1846 between the United States and the Republic of New Granada, the predecessor in ownership of the Isthmus of Panama to Colombia and the Republic of Panama. In Article 35 of that treaty the United States undertook to guarantee "the rights of sovereignty and property" of the Republic of New Granada over the

Isthmus. [9 Stat. 881; see Moore, a Digest of International Law (1906), Vol. III, 5-6] The 1903 treaty, by contrast, is strong in the affirmation of sovereign authority in the United States.

In Wilson v. Shaw, 204 U.S. 24, 27 S. Ct. 233, 235 (1907), the Supreme Court declared, "It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate." As the Fifth Circuit Court of Appeals held in United States v. Husband R. (Roach) [453 F.2d 1054, 1057, 1059 (5th Cir., 1971), cert. den. 406 U.S. 935 (1972)], "The Canal Zone is an unincorporated territory of the United States" to which applies the power of Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Congress, said the court, has "plenary power over the Canal Zone."

The controlling question, however, is whether the grant of power to Congress to dispose of the territory and property of the United States is exclusive or concurrent.

If the grant is concurrent, that is, if it may be exercised by the Executive as well as Congress, then it would be proper for the Executive to make a self-executing treaty disposing of such property without the necessity of implementing legislation by Congress. If, however, the grant of such power is exclusively to Congress, the treaty would not be self-executing and such implementing legislation would be necessary.

The power of disposition provided in Article IV, Sec. 3, clause 2, does not explicitly exclude concurrent power of disposition in the Executive. Also, Article IV generally deals with the relations between the states and the government of the United States. In this respect, the Supreme Court has consistently ruled that the Congressional power is controlling over state legislation. [See Annotation, 49 L. Ed., 1239, 1248] In sustaining the Wild Free-Roaming Horses and Burros Act, the Supreme Court stated in 1976 that "we have repeatedly observed that "[t]he power over the public lands thus entrusted to Congress is without limitations." United States v. San Francisco, 310 U.S. at 29. [Kleppe v. New Mexico, 426 U.S. 529, 539 (1976)]

In Wisconsin Railroad Co. V. Price County, [133 U.S. 496, 504 (1890)], the Supreme Court said, "The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." And in Utah Power and Light Co., v. United States [243 U.S. 389, 404 (1916)], the Court said:

> Not only does the Constitution (Art. IV, Sec. 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress (to dispose of United States property) is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

There is no Supreme Court decision clearly deciding whether a treaty disposing of property must be submitted to the entire Congress for approval. Nor is there any definitive Supreme Court ruling as to whether the power to dispose of territory and property, in Art. IV, Sec. 3, cl. 2, is exclusive in Congress or concurrent with the Executive.

Nor do the debates in the Constitutional Convention and the actions of the state ratifying conventions provide any clear guidance on these points. There was some incidental discussion but nothing conclusive. George Mason, in arguing that the House of Representatives alone should have the right of originating revenue bills, argued rhetorically that the Senate "could already sell the whole country by means of Treaties" and that "the Senate by means of treaty might alienate territory, etc., without legislative sanction." [Farrand, Records of the Federal Convention, II, 297] However, it is interesting that such an enormous power in one house of Congress excited little agitation among the delegates. There is no clear indication as to the Convention's mind on the relation between the treaty power and Congress' power to dispose of property.

Attorney General Griffin B. Bell, in his statement before the Senate Foreign Relations Committee on September 29, 1977, emphasized that the Ratifying Convention of Virginia proposed the following amendment to the Constitution:

> "7th. That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, on their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively." Elliot, Debates on the Federal Constitution Vol. 3, p. 660.

Attorney General Bell argues from this that the Founding Fathers were aware "that the Constitution authorizes self-executing treaties disposing of the territory and property of the United States." But this conclusion is unwarranted. The same amendment was proposed by the North Carolina Convention [United States: Formation of the Union (Govt. Printing Office, 1927), 1048] The proposals are fully consistent with the interpretation that the assent of Congress is required to a treaty alienating United States territory. The first clause of the proposed amendment asks merely that commercial treaties be ratified by two-thirds of all the Senators rather than by two-thirds of the Senators present. The following restriction, that treaties ceding United States territory shall require ratification by three-fourths of all the members of both Houses is fully consistent with an interpretation that any treaty alienating United States territory already required consent of both houses. What the Virginia and North Carolina conventions sought to do was to fasten on those treaties a requirement for a virtually prohibitive majority, three-fourths of all the members of both houses. One cannot draw from this the conclusion that, because those proposed amendments were not adopted, therefore the House of Representatives is entirely excluded from the process of alienating United States territory by treaty.

The treaty power is very broad but it is not unlimited. "There is nothing in 'the treaty power' which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." [Reid v. Covert, 354 U.S. 1, 16 (1957)]

In Holden v. Joy, the Supreme Court noted "there are many authorities where it is held that a treaty may convey to a grantee a good title to [lands belonging to the United States] without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political." [Holden v. Joy, 17 Wall. (84 U.S.) 211, 247 (1972)] The authorities cited by the Court for this proposition are distinguisable. More importantly, this statement of the Court was only a dictum as the Court said, "it is not necessary to decide the question in this case, as the treaty in question has been fully carried into effect, and the provisions have been repeatedly recognized by Congress as valid." [Ibid.]

In Asakura v. Seattle, 256 U.S. 332, 341 (1924), the Supreme Court said, "The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations." The Court also noted that the treaty in that case "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." But the treaty involved in Asakura was one recognizing the right of Japanese subjects to "carry on trade" in the United States. It did not involve in any way the power to dispose of United States property granted to Congress in Art. IV, Sec. 3, cl. 2, of the Constitution.

In Geofroy v. Riggs, 133 U.S. 258 (1890), a convention with France guaranteed the right of French citizens to inherit property in the United States. The Court held that the convention prevailed over the contrary law of Maryland so as to authorize the inheritance by a French citizen of property in the District of Columbia.

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth Railroad Co., v. Lowe, 114 U.S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware v. Hylton, 3 Dall. 199; Chirac v. Chirac, 2 Wheat. 259; Havenstein v. Lynham, 100 U.S. 483; 8 Opinions Attys. Gen. 417; The People v. Gerke, 5 California, 381.

However, while the convention was in effect, Congress adopted the Maryland law as the law of District of Columbia, but suspended that law insofar as it conflicted with the convention. This amounted to a clear adoption by Congress of the terms of the convention. More significantly, the Geofroy case did not involve the transfer of any property owned by the United States. The dictum in the Geofroy case is very broad but its generalizations should be limited to the facts of that case.

While judicial decisions do not comprehensively define Congress' property disposal power in relation to the treaty power, there are several instances where the accepted practice among the Congress, Executive and the Judiciary, has supported the conclusion that Congress' power is exclusive.

Many treaties and executive agreements with Indian tribes have involved the transfer of real property. But even where the treaty or executive agreement conveyed to the Indians the land in fee simple, which is the maximum interest which has been conveyed to Indian tribes, it appears that such land was held by the Indians subject to the power of the United States to exercise eminent domain. In Cherokee Nation v. Southern Kansas R. Co., (135 U.S. 641 (1890), the Supreme Court noted:

> The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States, is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several states, for purposes necessary to the execution of the powers granted to the general government by the Constitution.
>
> . . .
>
> The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner. [135 U.S. at 656-57]

In Sioux Tribe of Indians v. United States [316 U.S. 317 1942)], the Supreme Court ruled that the Sioux did not obtain a compensable interest in lands granted to them by executive order so as to entitle them to payment where the lands were restored to the public domain by a later executive order. The Court was of the opinion that "executive order reservations" did not grant a compensable interest to the Indians. Such an interest was granted only in reservations made by "treaty or statute." In the latter cases, the power of the Executive depended on congressional approval: "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the Executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." [316 U.S. at 326]

The Indian treaties cannot be regarded as authority for the conveyance of United States property to a foreign power by treaty without Congressional authorization. Even where those treaties or agreements conveyed a fee simple interest, that interest remained subject to the United States power of eminent domain. And even the conveyance of that interest, according to the Sioux case, required a Congressional delegation of authority to the Executive. It follows that the complete and total surrender of sovereignty involved in the Panama Canal Treaty should require Congressional action even more strongly than the Indian treaties.

Another illuminating type of case from past experience is the sort of treaty involving settlement of boundary claims. For example, the Webster-Ashburton Treaty of 1842, ceded land to Great Britain which had been under dispute. [8 Stat. 572] Congress implemented the treaty by appropriating money to carry out the terms. [See ch. 89, 5 Stat. 623] The 1846 Oregon Treaty also involved the cession to Great Britain of United States claims to land then in dispute. [9 Stat. 869] Congress implemented the treaty by passing an act to organize the government of the Oregon Territory. [9 Stat. 323]

The Alaska Treaty of 1903 [32 Stat. 1961] established a tribunal to settle boundary disputes with Great Britain. The tribunal awarded some of the disputed territory to the United States and some to Great Britain. [See Bemis, A Diplomatic History of the United States (1965), 427] Congress implemented the treaty by appropriating funds to carry it out in 1903. [32 Stat. 1083]

The Chamizal Convention with Mexico in 1963 provided for the transfer of certain lands to Mexico. The convention provided:

> After this convention has entered into force and the necessary legislation has been enacted for carrying it out, the two Governments shall . . . determine the period of time appropriate for the Government of the United States to complete the following:
> (a) The acquisition, in conformity with its laws, of the lands to be transferred to Mexico. [15 U.S. T. 2]

Congress thereafter enacted legislation to authorize the Secretary of State "to acquire by donation, purchase, or condemnation, all lands required for transfer to Mexico as provided in said convention" and "to convey or exchange to Mexico properties acquired." [78 Stat. 184]

The major point to be made about boundary dispute treaties is that they are different from the Panama Canal Treaty which does not involve disputed land. Where there is a colorable claim to full ownership and sovereignty presented by both parties to a settlement treaty, it cannot be said to involve an unambiguous transfer of "Territory or other Property belonging to the United States", within the meaning of Art. IV, Sec. 3, cl. 2. Those boundary settlement treaties, even were they found to be lacking in Congressional approval, are not controlling on the Panama Canal Treaty issue.

The Lend-Lease program, instituted in 1940, involved the transfer of United States property to Great Britain. However, Attorney General Robert Jackson, in his opinion to the President, found that there was "ample statutory authority" for the disposal. It was therefore unnecessary to rely on Presidential authority alone. [39 Op. A.G. 484, 488 August 27, 1940]

In 1972, a treaty went into effect for the transfer by the United States to Japan of all rights and interests it had received to the Ryukyu and Daito Islands by the 1951 Treaty of Peace with

Japan. However, as Secretary of State Rogers pointed out in testimony before the Senate Foreign Relations Committee, the Japanese retained under the 1951 Treaty of Peace "residual sovereignty." Moreover, the transfer pursuant to that treaty seems to have been authorized by the Japan-United States Friendship Act of 1975 [22 U.S.C. 2901(a)(2)]

In 1897, Attorney General John W. Griggs issued an opinion on the alienation by the President or Secretary of War of United States property in Puerto Rico to a private person. The Attorney General said, "there is no legislation by Congress made for or properly applicable to the public domain in Puerto Rico. The power to dispose permanently of the public lands and public property in Puerto Rico rests in Congress, and in the absence of a statute conferring such power, cannot be exercised by the Executive department of the government." [22 Op. Att'y. Gen. 544, 545 (1899)]

With respect to the Panama Canal Zone itself, the 1942 Congressional proceedings involving an executive agreement transferring land and property in the Canal Zone to Panama are instructive. The transfer was effected by executive agreement which was then submitted to both houses for approval. It was objected by some Senators that it should have been done by treaty. Senator Connally, Chairman of the Senate Foreign Relations Committee, responded to these objections:

> Those who are opposing the measure object because the matter is brought before the Senate in the form of a joint resolution. They say it should be in the form of a treaty.
>
> Mr. President, I am and have been and in the future shall continue to be ardent in my maintenance of the integrity and the rights of the Senate of the United

> States in all its proper functions as a branch of the Government; but the matter covered by the joint resolution has to be passed by the Congress sooner or later in some form, for the simple reason that under the Constitution of the United States, Congress alone can vest title to property which belongs to the United States. The Constitution itself confers on Congress specific authority to transfer territory or lands belonging to the United States. So, if we had a formal treaty before us and if it should be ratified, it still would be necessary for the Congress to pass an act vesting in the Republic of Panama the title to the particular tracts of land; because "the Congress" means both bodies. The House of Representatives has a right to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise. [88 Cong. Rec. 9267]

In the House of Representatives, the Committee on Foreign Affairs stated in its report:

> Congressional approval of the Executive commitments to Panama is sought in the form of legislation because there is involved (a) a disposition of property of the United States and (b) an appropriation of funds, both requiring an exercise of the legislative power, independently of the treaty-making power. [House Report No. 78-271, p. 6]

There is abundant authority that Congress' power under Art. IV, Sec. 3, cl. 2, is "without limitations" in contexts other than the present sort of treaty controversy. [Annotation, 496, Ed. 2d 1239, 1246] Nor is there any sufficient reason for treating that Congressional power as less extensive in the treaty context. Art. IV, Sec. 3, cl. 2, represents a decision by the Constitutional Convention and the States to protect the property of the United States by ensuring that the disposition would be the prerogative of the United States government and not of the individual states. Moreover, the specific grant of that power only to Congress was not accidental. As the most broadly representative branch of government, it is appropriate that Congress is the only body to alienate from the American people that which is theirs. The treaty power does not confer on the President and two-thirds of the Senate a power to change the constitutional distribution of powers in any respect. Such power is not necessary to the orderly conduct of foreign relations. And its recognition would undermine public confidence in the representative character of the United States Government.

It must be remembered that Senate ratification of a treaty requires approval merely of "two-thirds of the Senators present." Executive agreements, which are very similar in power to treaties, [See United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942)] do not require any Congressional consent at all.

I hope that the consideration of the Panama Canal treaties, including particularly the treaty providing for transfer of United States property, will provide an occasion for the reaffirmation of the Congressional power with respect to the disposition of the territory or other property of the United States. Congress' power in this area ought to be regarded as exclusive. The American people ought to be deprived of their territory and property only by action of that governmental body most responsive to public opinion. That body is the entire Congress and most especially the House of Representatives.

Senator Allen. Professor Berger is the leading authority on American constitutional law and is author of the widely acclaimed new book on the Constitution, "Government by Judiciary."

Of course, Professor Berger has authored many works on the U.S. Constitution, and probably his best known book, "Executive Privilege," will be recalled throughout history for its great impact on the constitutional questions presented during the Watergate controversy.

Professor Berger has appeared in the past before this committee and has always made an extremely valuable contribution to the work of the committee in understanding issues involving the Constitution and the doctrine of separation of powers.

So, the committee is indeed greatly honored by Professor Berger's appearance, and certainly the distinguished ranking minority member of the committee and the minority staff of the committee are to be complimented for having made arrangements for the committee to receive Professor Berger's very valuable testimony.

Senator Hatch. We want to welcome you here, Professor Berger, not only because of your prestige as an eminent constitutional law scholar but also because of your great interest in upholding the principles of limited government—an interest which I am pleased to share with you.

In spite of all of the emotionalism surrounding the Panama Canal Treaties—and I think there are arguments on both sides—the most important issue, in many respects, is the constitutional one which you confront in your written statement. I refer, of course, to the question of whether the President can extend his power by concurrent jurisdiction to cede property by treaty without the consent of both Houses of Congress.

I shall be very interested in your testimony today. I think it is crucial to this country. As I have gone around the country, I have asked people if they have heard of this constitutional issue regarding the Panama Canal. Hardly anybody has read of it or understands it or cares about it. Yet, it probably is one of the most crucial issues, not because of the Panama Canal itself, but because it involves the separation of powers doctrine of the U.S. Constitution.

More specifically, it involves the continuing problem of an overextension of executive power not contemplated by the Constitution, following in the wake of Watergate.

We are grateful for your coming.

Senator Allen. Professor Berger, the Senate is now in session. Ordinarily committees cannot meet during the session of the Senate except for the first 2 hours of the Senate's session.

However, your testimony is so important that we were able to get permission of the Senate so that the committee might meet to hear your testimony.

So we are under no time constraints whatsoever. You may feel completely at leisure as you give your testimony. We are not hampered by any restraints of that sort at all.

We look forward very much to your testimony.

TESTIMONY OF RAOUL BERGER, AUTHOR OF "EXECUTIVE PRIVILEGE" AND "GOVERNMENT BY JUDICIARY"

Professor Berger. Mr. Chairman and Senator Hatch, I appreciat your courtesy.

Permit me to say preliminarily that I am no longer a member of th Harvard Law School. I was from 1971 to 1976 the Charles Warre senior fellow in the American League of History. But after ag 75 you cannot even serve as a janitor at Harvard Law School. I a now almost 77.

FOR PANAMA CANAL TREATY

Second, I want to make clear that I am for the Panama Cana Treaty as a matter of personal judgment. I am not here in any wa to discredit President Carter. I am here for precisely the reason tha Senator Hatch mentioned because I have an overriding commitmen to the Constitution.

You have invited me to comment on the relation between the articl IV, section 3(2) power of Congress to dispose of property of th United States and the treaty power, in light of the statements respecting the relation by Herbert J. Hansell, Legal Adviser, Departmen of State [1] and Ralph E. Erickson, Deputy Assistant Attorne General.[2]

Although I am in favor of the Panama Canal Treaty, I share you solicitude for the preservation of constitutional boundaries and you concern lest the function committed to Congress be diminished.

I have long held the conviction that all agents of the United States be they Justices, Members of Congress, or the President, must respec these boundaries. No agent of the people may overleap the bound of delegated power. That is the essence of constitutional governmen and of our democratic system.

Long experience has led me to be skeptical of arguments by representatives of the executive branch when they testify with respect t a dispute between Congress and the President, for they are the merely attorneys for a client, the President.

It was for this reason that Justice Jackson dismissed his own prior statements in the capacity of Attorney General as mere advocacy saying, a "judge cannot accept self-serving press statements for one o the interested parties as authority in answering a constitutional question, even if the advocate was himself." [3]

You have asked me to comment particularly on the statements that were made by the representatives of the State Department and the Department of Justice; namely, Mr. Hansell and Mr. Erickson. I may say immediately that the Hansell-Erickson testimony did not serve to diminish my skepticism.

I should add that I am not here as an opinion witness. What I have attempted to do is this: I have taken time to study your record and the various statements, and independently to study the constitutional sources and the cases and make up my mind as to where the truth lies in this morass of conflicting opinions. I am not going to ask you to rely on my opinion. Instead I will ask you to rely on the documentation because my opinion is worth no more than the documentation.

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[1] Hearings on the Panama Canal Treaty before the Senate Subcommittee on Separatio of Powers (95th Cong., 1st sess.) part II, p. 3 (July 29, 1977), hereafter cited as Hansell.

[2] Hearings before the House Subcommittee on the Panama Canal on "Treaties Affectin the Operations of the Panama Canal," (92 Cong., 2d sess.) p. 95 (Dec. 2, 1971), hereafte cited as Erickson.

[3] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 647 (1952), concurring opinion.

PROGRESSIVE ATTRITION OF CONGRESSIONAL POWERS

I agree, too, with Senator Hatch that the effect of these hearings ranges beyond the Panama Treaty. The Panama cession will constitute a landmark which, should the State Department prevail, will be cited down the years for concurrent jurisdiction of the President in the disposition of U.S. property. Acquiescence in such claims spells progressive attrition of congressional powers; it emboldens the executive to make ever more extravagant claims.

I would remind you that congressional acquiescence encourages solo Presidential adventures such as plunged us into the Korean and Vietnam wars. Congressional apathy fostered the expansion of executive secrecy. Then, as now, the State Department invoked flimsy precedents, for example, the pursuit of cattle rustlers across the Mexican border, to justify Presidential launching of a full-scale war.[4]

If Congress slumbers in the face of such claims, it may awaken like Samson shorn of his locks.

Earlier judicial statements that this or the other executive practice has been sealed by long-continued congressional acquiescence[5] need to be reexamined in light of more recent judicial opinions, more conformable to the Constitution, that Congress may not abdicate its powers[6] and a fortiori, it cannot lose them by disuse[7] that usurpation cannot be legitimated by repetition.[8]

Senatorial insistence on respect for constitutional boundaries will warn the executive against encroachments on Congress powers; it will alert foreign nations to the fact that treaties for the cession of U.S. property must be subject to the consent of the full Congress.

Mr. Erickson, the Deputy Attorney General, addressing himself to the question whether article IV, section 3(2), "pursuant to which Congress has the power to dispose of property of the United States is an exclusive grant of legislative power to the Congress or whether the Congress and the President and the Senate, through the treaty power, share that authority," handsomely states that "the answer to this question is not simple and altogether free from doubt."[9]

That doubt counsels against encroachments on a power explicitly conferred on Congress; a clear case for establishment of "concurrent jurisdiction" is needed in the teeth of that express grant.

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[4] R. Berger, "Executive Privilege: A Constitutional Myth" 75–88 (1974).

[5] Congress "uniformly and repeatedly acquiesced in the practice." "It may be argued that while the facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471 (1915). But as Justice Frankfurter later declared, "Deeply embedded traditional ways of conducting a government cannot supplant the Constitution or legislation . . . ." Youngstown Sheet, supra, n. 3 at 610, concurring opinion.

[6] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935).

[7] *United States* v. *Morton Salt Co.*, 338 U.S. 632. 647 (1950).

[8] "That an unconstitutional action has been taken before surely does not render that same action less unconstitutional at a later date." *Powell* v. *McCormack*, 395 U.S. 486, 546–547 (1969). *Zweibon* v. *Mitchell*, 516 F. 2d 594, 616 (D.C. Cir. 1975): "there can be no doubt that an unconstitutional practice, no matter how inveterate, cannot be condoned by the Judiciary." *United States* v. *Morton Salt Co.*, 338, U.S. 632, 647 (1950): 'nonexistent powers can [not] be prescribed by an unchallenged exercise . . ."

[9] Erickson 97.

In support of the claim that the President and Senate enjoy "concurrent power" to dispose of U.S. property, Messrs. Hansell and Erickson invoke a melange of dicta, without weighing even stronger statements that Congress disposal power is "exclusive." Thus, the Suprem Court declared that article IV "implies an exclusion of all other authority over the property which could interfere with this right o obstruct its exercise."[10]

Echoing such judicial statements, an opinion of the Attorney General stated in 1899 that:

> The power to dispose permanently of the public lands and public property i Puerto Rico rests in Congress, and in the absence of a statute conferring suc power, cannot be exercised by the Executive Department of the Government.[1

Such statements respond to two cardinal rules of construction First, there is the rule that express mention signifies implied exclusion, which the Supreme Court has employed again and again: "Whe a statute limits a thing to be done in a particular mode, it includes th negative of any other mode."[12] In other words, when article IV say "Congress shall dispose," that means Congress and nobody else shal dispose.

The rule was invoked by the Founders; for example, Egbert Benson said in the First Congress, which drafted the Bill of Rights and in which sat many Framers and Ratifiers, that:

> It cannot be rationally intended that all offices should be held during good behaviour, because the Constitution has declared [only] one office—namely the judicial office—to be held by this tenure."[13]

The fact, emphasized by Hansell, that "the property clause contains no language excluding concurrent jurisdiction of the treaty power" is therefore of no moment. Having given Congress the power to dispose of public property, it follows that the President and Senate were "impliedly excluded" therefrom.

Second, there is the settled rule that the specific governs the general. The Supreme Court has said:

> Where there is in an act a specific provision relating to a particular subject, that provision must govern in respect to that subject as against general provisions in other parts of the act, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.[14]

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[10] *Wisconsin Cent. R.R. Co.* v. *Price County*, 133 U.S. 496, 504 (1890); see also *Swiss Nat. Ins. Co.* v. *Miles*, 289 Fed. 571. 574 (App. D.C. 1923).

[11] 22 Op. Atty. Gen., 544, 545 (1899). 2 J. Story, *Commentaries on the Constitution of the United States*, Section 1328. p. 200 (4th ed. 1873): "The power of Congress over the public territory is clearly exclusive and universal * * *" Cf. *Osborne* v. *United States*, 145, F. 2d 892, 896 (9th Cir. 1944).

[12] *Botany Worsted Mills* v. *United* States, 278 U.S. 282, 289 (1929); *T.I.M.E.* v. *United States*, 359 U.S. 464, 471 (1959): "we find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I [for railroads] were wholly omitted in the Motor Carrier Act."

[13] *13 Annals of Cong.* 505 (2d ed. 1836) (print bearing running head "History of Congress"); and see Alexander White, id. 517.

[14] *Swiss Nat. Ins. Co.* v. *Miller*, 289 Fed. 570, 574, (App. D.C. 1923). *Ginsberg & Son* v. *Popkin*, 285 U.S. 204, 208 (1932): "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Buffum* v. *Chase Nat. Bank*, 192 F. 2d 58. 61 (7th Cir. 1951). In this light, the fact, stressed by Hansell, that the Framers contemplated that a treaty could affect "territorial" rights, Hansel 5, is not decisive, for the treaty would yet be subject to the special Congress "power to dispose." There is no evidence in the records of the Convention that the Framers intended in any way to curtail that power, or to give the President a share in it. Were the matter less clear, we should yet "prefer a construction which leaves to each element of the statute a function in some way different from the others" to one which causes one section to overlap another. *United States* v. *Dinerstein*, 362 F. 2d 852, 855–856 (2d Cir. 1966).

In terms of the present issue, the specific power of disposition governs the general treaty provision. In other words, if the treaty power stood alone it might be read to comprehend the power "to dispose." But since the Framers in addressing themselves to the power to dispose of property, specifically confided it to Congress alone, it lies outside the treaty power. That is the basic rule of construction.

I may say that we have centuries of history that teach, in the absence of clear definition, resort should be had to these well-established maxims of construction.

Under these rules it is of no avail that, according to Hansell, "there is no restraint expressed in respect to dispositions" in the treaty power itself, because there is an implied exclusion which is as good as written in the constitutional text.

For this "there is no restraint expressed" Mr. Hansell relies on *Geofroy* v. *Riggs*:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the * * * departments. * * *"[15]

Now, in the text of that quote there is the distinction between the treaty power which is "expressed" and restraints which can be "found" in the Constitution. *Geofroy* does not call for express restraints—it suffices that they can be found in the Constitution.

The "implied exclusion" is "found" in the Constitution by virtue of the express grant of disposal power to Congress under the rule of express mention, and of the fact that the general treaty power is limited by the special congressional power of disposition.

These principles are reflected in the Supreme Court's statement in *Sioux Tribe of Indians* v. *United States*:

> Since the Constitution places the authority to dispose of public lands exclusively in Congress, the Executive's power to convey any interest in the lands must be traced to Congressional delegation of its authority.[16]

To this the State Department responds that *Sioux Tribe* "did not deal with the relation between the treaty power and the congressional power under article IV, section 3, clause 2;" Hansell labelled it "dicta."[17]

By this test the Hansell-Erickson collection of dicta falls to the ground, for almost all were not uttered in the context of that relation.

The executive branch employs a double standard—what is dictum when the language is unfavorable to it becomes holy writ when the dictum reads in its favor.

Erickson, for example, tells us that: "*Jones* against *Meehan* is cited as an example by reason of the quote and the language there, which it seems to me is of significance, irrespective of the particular facts involved."[18]

What he is actually saying is that no matter what the cites are, the language is so clear that we should pay heed to it.

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[15] Hansell 4; 133 U.S. 258, 267 (1890), emphasis added. One might with equal force argue that no limitation on Congress' "power to dispose" is "expressed" in article IV.

[16] 316 U.S. 317, 326 (1942). *Turner* v. *American Baptist Missionary Union*, 24 Fed. Cas. (No. 14,251) 344, 346 (C. Ct. Mich. 1852): "Without a law the president is not authorized to sell the public lands . . . The [Indian] treaty, in fact appropriated the above tract of 160 acres for a particular purpose, but, to effectuate that purpose, an act of congress was passed."

[17] Hansell 27, 22.

[18] Erickson 105.

We have at least equally clear language—maybe even sharper language—on the exclusivity of the disposal power.

Messrs. Erickson and Hansell cannot have it both ways. They have got to make up their minds. Either all dicta go by the board or you have to weigh them in the same scales. In truth, dicta carry little weight when a particular issue has not been decided.

Chief Justice Marshall dismissed his own dicta in *Marbury* v. *Madison* when they were pressed upon him in *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821), on the ground that dicta do not receive the careful consideration accorded to the question "actually before the court."

The statements here quoted respecting "exclusivity" carry sepcial weight because they reflect traditional canons of construction and were generally in support of the particular holding. The foregoing considerations should suffice to dispose of a number of other Hansell-Erickson arguments for "Concurrent jurisdiction," but I shall consider them for the cake of completeness.

I hope you will bear with me because I think it is precisely this kind of analysis that should dissipate the myths. One must face up to the arguments that have been made on behalf of the administration. If you will be patient I will do this, one after another.

To escape from the exclusivity of Congress disposal power, Mr. Erickson argues: "To begin with, article IV, section 3, clause 2, uses the same terminology, 'Congress shall have power,' as article I, section 8, which in our opinion, permits treaty provisions relating to such matters to be self-executing [that is, without congressional action], at least to the extent that the inherent character of the power or other constitutional provisions do not make the power exclusive to Congress." [19]

Erickson's qualification is a concession that some article I powers cannot be concurrently exercised by the President. The Department of State concedes that "treaties may [not] impose taxes." [20]

Why is that power more "inherently" exclusive than such other article I, section 8 powers as the power to estabilsh post offices, to provide and maintain a navy, to declare war, to coin money, et cetera, all of which manifestly cannot be exercised by treaty. Erickson proves too much.

Second, he urges: "Article IV, section 3, clause 2, is included in a portion of the Constitution which deals with the distribution of authority between the Federal and State governments. It does not purport to allocate powers exercisable by Congress or pursuant to treaty." [21]

But Section 3(2) unmistakably does "allocate powers exercisable by Congress": "The Congress shall have power to dispose of . . . property belonging to the United States."

Hansell argues that the placement of the property article in clause 4 . . . provides strong evidence that the property clause does not restrict the treaty power." [22]

That the "placement of a power in one or another article is without significance for its scope is readily demonstrable: (a) "Congress shall have power to declare the punishment of treason" is located in the judiciary article III; (b) Congress powers to make "exceptions and regulations" respecting the Supreme Court's appellate jurisdiction is lodged in article III, section 2; (c) the provision that "Congress may determine the time of choosing the electors" is placed in the executive article II, section 1(4).

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[19] Id. 97.
[20] Hansell 25.
[21] Erickson 97.
[22] Hansell 4–5, emphasis added.

Does this authorize the President by treaty to declare the punishment of treason, to regulate the Court's appellate jurisdiction, or to interpose in the choice of electors? Obviously not.

Whether located in article I or article IV, "Congress shall have power" means one and the same thing—the power resides in Congress, not in the President. It needs constantly to be borne in mind that the President has circumvented Senate participation in treatymaking by affixing the label "Executive Agreements" to treaties, without constitutional warrant [23] so that claims ostensibly made on behalf of the Senate and the President can be turned to his own advantage.

Mr. Hansell also attaches significance to the close linkage between the article IV "power to dispose" and "the power to make all needful rules and regulations" respecting the territory or other property belonging to the United States, and cites *Geofroy* v. *Riggs* for the proposition that "the treaty power can be used to make rules and regulations governing the territory belonging to the United States, even in the District of Columbia." [24]

The disposition power and the regulation power are contained in the same article IV provision.

Geofroy presented the question whether a citizen of France could take land in the District of Columbia by descent from a citizen of the United States. Local law withheld the right, but in keeping with national solicitude for protection of citizens abroad, a treaty provided for reciprocal rights of inheritance in such circumstances for citizens of both signatories.

In consequence, the treaty overrode the local provision; but this hardly stretches to the "making of rules and regulations" by treaty for the District of Columbia. Were this true, the President could by treaty take over the governance of the District of Columbia, in spite of the article I, section 8(17) provision that, "The Congress shall have power to exercise exclusive jurisdiction in all cases whatever over such district."

Assume notwithstanding, contrary to fact, that the treaty power does indeed comprehend the "making of rules and regulations governing the * * * District of Columbia," does the "close" linkage with the "power to dispose" comprehend a disposition of the White House by treaty? Such arguments verge on absurdity.

Messrs. Hansell and Erickson have cited a string of cases in support of "The power to dispose of public land * * * by treaty." [25]

Such cases, such as *Holden* v. *Joy*, 84 U.S. 211 (1872), and *Jones* v. *Meehan*, 175 U.S. 1 (1899), have frequently been cited in your hearings for opposing viewpoints.

Let me begin with Hansell's citation of *Missouri* v. *Holland*, 252 U.S. 416 (1920), for it quickly illustrates how far-fetched are the State

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[23] Berger, supra n. 4 at 140–162.
[24] Hansell 5.
[25] Id.; Erickson 97.

Department's interpretations. *Missouri* v. *Holland* arose out of a Stat challenge to the treaty with Great Britain for the protection of migratory birds which annually traversed parts of the United States and o Canada. Justice Holmes, addressing the argument that the treaty infringed powers reserved to the States by the 10th amendment, stated

> Wild birds are not in the possession of any one, and possession is the beginnin of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State, and in a week a thousand miles away.[26]

Consequently, he held the State could assert no "title" to migrator birds. By the same token, the United States could lay no claims t "ownership" of the birds, and *Missouri* v. *Holland* is therefore wholl irrelevant to the power by treaty to dispose of property belonging t the United States.

Holden v. *Joy* and *Jones* v. *Meehan* will repay close analysis becaus they involve Indian treaties which constitute one of the pillars of th argument, to quote Erickson, that "the United States can convey it title by way of self-executing treaty and that no implementing legislation is necessary." [27]

To begin with *Jones*, both Hansell and Erickson quote:

> It is well settled that a good title to parts of the lands of an Indian tribe ma be granted to individuals by a treaty between the United States and the tribes without any act of Congress, or any patent from the Executive authority of th United States.[28]

The treaty had "set apart from the tract hereby ceded [by th tribe] a reservation of six hundred and forty acres * * *" for an individual Indian; and the issue was what kind of title did he take. Th Court quoted from an opinion of Attorney General Roger Taney destined before long to succeed Chief Justice Marshall:

> These reservations are excepted out of the grant made by the treaty, and did not therefore pass with it; consequently the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title.[29]

I might say that almost all Indian treaty cases involve precisely such issues. A treaty reserved land to the Indians. Titles to those lands never passed to the United States. The United States, therefore, was not disposing of its property, but was mechanically confirming what the treaty provided; namely, that the individual Indian had the title.

The Court held that "the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple." [30]

That explanation presumably responded to the fact that tribal lands were generally held in common; individual titles were all but unknown, so that such title had to be secured through the machinery of the treaty.

But that is far from a disposition of Government land because, as Taney explained, the "reserved" title remained in the Indians. Many, if not most, of the cases of Indian treaties involve such "reserve" provisions.[31]

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[26] 252 U.S. at 434.
[27] Erickson 97.
[28] Hansell 6; Erickson 97.
[29] 175 U.S. at 12.
[30] Id. 21.
[31] See infra appendix.

The quotation from *Holden* v. *Joy*, Erickson acknowledges—I found that the Attorney General also generously concedes—is dictum; notwithstanding, Hansell relies on it as "a clear statement of the law." [32]

It is a statement. I am not sure that it is clear. It certainly did not state the law, notwithstanding our respect for the Supreme Court, we are entitled to look behind the statement.

The statement was:

> It is insisted that the President and the Senate, in concluding such a treaty, could not lawfully covenant that a patent should be issued to convey lands which belonged to the United States without the consent of Congress, which cannot be admitted.

In a word, it would not admit consent of Congress was required, and it went on to say:

> On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in such cases purely political.[33]

What bearing the last clause has on Congress "power to dispose" of public land at first escaped me. But when I came to research the cases cited I found that this particular clause was lifted from an earlier statement by the court in *Foster* v. *Neilson*, where the Court said, under one of these treaties, it is not the function of Congress to construe the Constitution or the treaty. That is a purely judicial function, that is our job. That is all that last clause means. You have the *Foster* v. *Neilson* quotes in the appendix to my statement.

As to the "many authorities," the Court's citations could hardly be farther afield. To avoid cluttering this statement with a minute analysis of each case cited by the Court for the assertion that "a treaty may convey to a grantee a good title . . . without an act of Congress," I have abstracted them in an appendix, so that you may see for yourself that half of the cases thus cited are altogether irrelevant, and that the rest concern "reserves" under which, as Taney observed, no title had passed to the United States but remained in the given Indians.

In considering such dicta, it is well to bear in mind Chief Justice Taney's statement that the Court's "opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." [34]

I would urge that while we should have a proper respect for the Supreme Court, we should not yield to a mystique of the Court any more than we yielded to the mystique of the Presidency in the case of Mr. Nixon. We are always entitled—you, as Members of Congress, and I, as an American citizen—to look behind these holdings and be critical of the courts. I have a letter from Justice Black, with one of whose opinions I ventured to disagree, stating, "I do not agree with your conclusions, but I welcome your argument. That is the only way in which we will arrive at the truth."

I would always urge you to go behind these opinions, remembering what the Warren Courts taught us and the Burger Courts are teaching us anew.

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[32] Erickson 97; Hansell 22.

[33] Quoted by Hansell 5–6; 84 U.S. at 247.

[34] *The Passenger Cases,* 48 U.S. (7 How.) 283, 470 (1849), dissenting opinion.

By the Taney standard the *Holden* dictum is no authority at all. The inappositeness of *Holden* is underscored by the facts.

In May 1928 and February 1833, "the United States agreed to possess the Cherokees of 7 million acres of land west of the Mississippi."

It "was the policy of the United States to induce Indians to surrender their lands and possessions to the United States and emigrate and settle in the territory provided for them in the treaties," so an exchange of land was provided.

But a third treaty, that of December 1835, proved necessary, whereby the Indians ceded their lands to the United States in consideration of $5 million to be invested in the manner stipulated. The Indians considered that the prior treaties, confirmed by the new, did not contain a sufficient quantity of land, so the United States agreed to convey an additional tract in consideration of $500,000 to be deducted from the $5 million.[35]

This may be viewed either as a purchase and sale or an exchange: "the Cherokees were competent to make the sale to the United States and to purchase the lands agreed to be conveyed to them * * * " And the transaction was authorized by the act of 1830, which empowered the President to set aside land west of the Mississippi for the reception of such tribes as chose to emigrate, and to "exchange" such lands with any tribe.[36]

The 1830 act served to ratify the act of 1838, and "ratification is equivalent to original authority."[37]

"It is well settled that Congress may * * * 'ratify * * * acts which it might have authorized' * * * and give the force of law to official action unauthorized when taken."[38]

Although the subsequent 1833 and 1835 treaties differed in some particulars from the authorization, the purpose was the same—"to induce the Indians * * * to emigrate and settle in the country long before set apart for that purpose."[39]

When, therefore, the Court, speaking to the contention that the President and the Senate "could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress," stated that "a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it," it was making a statement that was unnecessary to the decisions, because Congress had authorized the conveyance.

I have learned that the Attorney General in his statement before the Senate Foreign Relations Committee stated that "The Court conceded that the question was immaterial" because Congress had actually implemented and ratified that particular treaty. Ratification, as you know, is as good as having authorized it from the very beginning.

As to other treaties, Hansell tells us, "the precedents look two ways." One, some have been "contingent upon congressional authorization." Two, the "precedents supporting the power to dispose of property by treaty alone," he states, "can be found in the boundary treaties with neighboring powers, especially in the treaties between the United States and Great Britain of 1842 and 1846 for the location of our northeast and northwest boundaries * * *." [40]

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[35] 84 U.S. at 237, 238, 241.
[36] Id. 245, 238–239.
[37] *Wilson* v. *Shaw,* 204 U.S. 24, 32 (1907).
[38] *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 301–302 (1937).
[39] 84 U.S. at 240.

Let me underscore that the best cases Hansell can invoke for his position are boundary cases.

Settlement of boundary disputes are not really cessions of U.S. property. The Oregon boundary dispute proceeded from an inflated claim: "Fifty-Four Forty or Fight"; the British, on the other hand, claimed land down to the 42d parallel.

If you will look into history of that period, you will find that the authorities consider that the British claim was better than our own. The American population in this area was very thinly scattered over a vast terrain.

Only when the dispute was settled by treaty—at 49 degrees—could either party confidently assert that it had title.

If you have ever owned a farm and had a boundary dispute you did not really know what you owned until the court told you; you had to bring a suit to remove a cloud from title to determine just what your boundaries actually were.[41]

Consequently, as Samuel Crandall, a respected commentator stated, "A treaty for the determination of a disputed line operates not as a treaty of cession, but of recognition." [42]

Those boundary cases are the strongest cases that Hansell could invoke. In my judgment, they shed no real light on the problem.

Among other examples of alleged treaty transfers of property, Hansell instances the return to Japan of the Ryukyu Islands.[43]

By article III of the 1951 Treaty of Peace with Japan, the United States received the right to exercise "all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of those islands. . . ."

There is not a word about cession of territory or sovereignty. They are saying go ahead and exercise the powers of administration and jurisdiction.

While Japan renounced, in article II, "all right, title and claim" to various territories, it made no similar renunciation with respect to the Ryukyus." [44]

Quoting the Legal Adviser of the State Department, that "sovereignty over the Ryukyu Islands . . . remains in Japan . . .", a district court stated that "Sovereignty over a territory may be transferred by an agreement of cession," but it concluded that there had been no cession.[45]

Mark that the position of Mr. Hansell today really departs with respect to these islands from the position that was taken in court by the legal adviser.

With respect to the same islands, the Fourth Circuit Court of Appeals quoted a statement by Ambassador John Foster Dulles, a delegate to the Japanese Peace Conference, that the aim was "to permit Japan to retain residual sovereignty," and held that the treaty did not make "the island a part of the United States, and it remains a foreign country for purposes of" the Federal Tort Claims Act.[46]

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[40] Hansell 6.

[41] S. E. Morison, "Oxford History of the American People," 538, 546–547 (1965).

[42] S. Crandall, "Treaties, Their Making and Enforcement," 226 (2d ed. 1916).

[43] Hansell 6.

[44] 3 U.S.T. 3169, 3172, 3173.

[45] *United States v. Ushi Shiroma*, 123 F. Supp. 145, 149, 148 (D. Hawaii, 1954).

Let us turn to Panama.

"In the history of transfers of property to Panama," Hansell tells us, "we have had a mixed practice."[47] In other words, it cuts both ways.

By the 1903 Panama Convention, Panama granted to the United States "all the rights, power and authority within the Zone . . . which the United States would possess if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority. . . ."[48]

The words "if it were sovereign" signal an intent to stop short of a cession of sovereignty. That is confirmed by an "Opinion of the Attorney General." Considering the Tariff Act levy of duties on articles imported "into the United States or into any of its possessions," he stated that "the Canal Zone is not one of the possessions of the United States within the meaning of that term as used by Congress in the Tariff Act, but rather is a place subject to the use, occupation, and control of the United States for a particular purpose."[49]

In a word, the opinion of the Attorney General distinguishes a possession of the United States from a place which is merely subject to the use, occupation, and control of the United States.

In *Luckenbach S.S. Co.* v. *United States*, Chief Justice Taft stated, "Whether the grant in the treaty amounts to a complete cession of territory and dominion to the United States or is so limited as to leave titular sovereignty in the Republic of Panama, is a question which has been the subject of diverging opinions" (in the words of Hansell, "We have had a mixed practice"). Taft, writing for the Court, found it unnecessary to decide that question and is, therefore still open.[50]

Instead, Taft relied on a "long continued course of legislation and administrative action that has operated to require that the ports in the Canal Zone are to be regarded as foreign ports within the meaning" of the act governing the transport of "mail between the United States and any foreign part."[51] For one of the most domestic functions—the transfer of mail—Panama was a foreign country, a foreign port, not a possession of the United States. That fact itself is a hint that the Panama Treaty is no more a cession than the Japanese Treaty respecting the Ryukyus.

SOVEREIGNTY NOT THE ISSUE

It does not follow, however, and I want to caution you here, that the interests of the United States do not constitute "property of the United States." The grant of "use and occupation . . . in perpetuity" constitutes "property" no less than the familiar lease of realty for 99 years.

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[46] *Burna* v. *United States,* 40 F. 2d 720, 721 (4th Cir. 1957).

[47] Hansell 7.

[48] Quoted Hearings, supra n. 1, part I, p. 5, emphasis added.

[49] 27 Opinion of the Attorney General 594, 595 (1909).

[50] 280 U.S. 173, 177–178 (1930).

[51] Id. 178.

Then there are the installations that cost billions of dollars. Disposition of these no less requires the consent of Congress than does that of territory. In 1942, the President, by executive agreement, promised to transfer certain installations to Panama subject, however, to congressional approval.[52]

A similar provision is to be found in the treaty of 1955.[53] These are executive constructions that speak against Messrs. Hansell and Erickson.

In sum, Messrs. Hansell and Erickson have failed, in my opinion, to make out a case for "concurrent jurisdiction" with Congress in the disposition of U.S. property. If the President is to fly in the face of the express "power of Congress to dispose" it must be on a sounder basis than the arguments they have advanced.

In my judgment, the Panama Treaty should contain a provision making it subject to approval of the Congress.

ANALYSIS OF THE OPINION OF THE ATTORNEY GENERAL

Now, gentlemen, I pass to a six-page addendum which is devoted to a statement by Attorney General Bell before the Senate Foreign Relations Committee in late September. It is an addendum for the simple reason that the Attorney General's statement only reached me through the courtesy of your staff only last Saturday. I just had a few days to study and draft an opinion.

It bears the weight of a statement due to the statement of any Attorney General of the United States. It must be carefully scrutinized.

Only three points made by the Attorney General seem to me to call for additional comment, and of these I shall speak in turn.

One, the *Percheman* case.

The Attorney General cites *United States* v. *Percheman*, 32 U.S. (7 Pet.) 511, 88–89 (1833) to prove that "the Court held self-executing"—which means it does not need the consent of Congress—"certain clauses of the Florida Treaty with Spain which related to the regulation of property rights in newly acquired territory." A.G. at p. 10.

At the cited pages it appears that article 8 of the treaty provided:

> All the grants of land made before the 24th of January 1818, by his Catholic Majesty . . . in the said territory ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands. . . .

In a word, just like the Indian reserves, grants had been made by the King of Spain to private individuals. Reference to those private grants was made in the treaty.

This article, Chief Justice Marshall remarked: "Must be intended to stipulate expressly for that security of private property which the laws and usages of nations would, without express stipulation, have conferred * * *" In other words, even in the absence of any stipulation under the law of nations, in any cession by one nation to another, private property will be respected. The treaty merely expressed that respect for private property.

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[52] "When the authority of the Congress . . . shall have been obtained therefore . . ." Agreement of May 18, 1942, 59 Stat. (Pt. 2) 1289.

[53] Agreement of January 25, 1955, 6 U.S.T. 2273, 2278.

Marshall continued, "Without it (article 8), the title of individuals would remain as valid under the new government as they were under the old * * * the security of (pre-existing) private property was intended by the parties * * *."

In short, the treaty provided that prior Spanish grants to private persons should be ratified and confirmed, a provision far removed from Presidential "regulation" of public territory. There was no reason for the treaty to be other than self-executing because there was no disposition of public properties.

Moreover, *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314–315 (1829) a case cited by the Attorney General (A.G. at p. 3), held with respect to the selfsame provision that "the ratification and confirmation which are promised must be by the act of the Legislature," that is Congress. So, even this confirmation was not self-executing. The citation to *Percheman* illustrated why I approach an Attorney General's statement with something less than awe.

By this I mean no disrespect to the Attorney General personally. I did not have time to find the lovely statement by Justice Jackson where he contritely rejected a formal opinion that he had signed as Attorney General, noting the possibility that he may not have had the time to study it. Bearing in mind the torrent of things that have to be signed by the Attorney General, I can hardly ask him to rush out to the library as old man Berger did to read *United States* v. *Percheman* for himself.

This is without disrespect to the Attorney General personally. Attorneys General have to rely on their subordinates.

I move now to remarks in the legislative history of the Constitution. There are a group of quotations in the legislative history which the Attorney General asserts show that "the members of the Convention were fully aware of the possibility that a treaty might dispose of the territory or property of the United States" (A.G. at p. 5).

I am not going to quote all of them in this oral statement, but shall content myself with a few.

The Attorney General begins with the remark of George Mason in the Constitutional Convention: "The Senate by means of a treaty might alienate territory etc. without legislative sanction" (A.G. at p. 6; 2 Farrand 297).

This was during a debate on a resolution that "Each House shall possess the right of originating bills, when Mason seconded Strong's motion to "except bills for raising money for the purposes of revenue, or for appropriating the same," which ultimately found its way into the Constitution, and had nothing to do with the treaty power.

The Senate, said Mason, "could already sell the whole country by means of treaties," plainly an extravagant overstatement, made at a time when the treaty was not under discussion. His "alienate territory" remark may merely represent a strategic retreat from his untenable "sell the whole country" remark.

Who has not made in the course of eloquent discourse, or what he deemed eloquent discourse, a remark which thirty seconds later he regretted making.

I suspect that is what happened to George Mason, and he tried to tone it down.

Now for the rest of the quotations, considered in my written statement, they all deal with boundary disputes. One and all. Some dealt with the anxiety lest the Mississippi be given away.

You remember from your history courses how vital the Mississippi was to the settlers west of the Appalachian. They felt their whole future depended on having free access to the Mississippi and the expansion of the West. They were worried that they might be sold down the river. Our claim to the Mississippi really was not made good until the Louisiana Purchase.

When the treaty power was under discussion, Williamson and Spaight moved "that no Treaty of Peace affecting territorial rights should be made without concurrence of two-thirds of the [members of the Senate present]" (A.G. at p. 6; 2 Farrand 543). Similarly, Gerry, speaking for a greater proportion of votes on "treaties of peace," said that here: "The dearest interests will be at stake, as the fisheries, territories, etc. In treaties of peace also there is more danger to the extremities of the Continent of being sacrificed than on any other occasion" (A.G. at p. 6; 2 Farrand 541).

The "extremities of the Continent" has reference to boundary disputes which do not really involve territory owned by the United States.

"Sherman and Morris proposed but did not formally move," the Attorney General states, "the following proviso:

"But no treaty (of peace) shall be made without the concurrence of the House of Representatives, by which the territorial boundaries of the United States may be contracted * * *" (A.G. at p. 6; 4 Farrand 58).

Farrand adds that "The subject was then debated, but the motion does not appear to have been made" (A.G. at p. 6; 4 Farrand 58).

Why was the motion not made after debate? Presumably, the matter was postponed for consideration when article IV, section 3(2) would come up for discussion. During this subsequent discussion of "The Legislature shall have power to dispose of . . . the territory . . .", it is singular that no mention was made of an exception for disposition under the treaty power (2 Farrand 466).

As you know, Mr. Chairman, somebody that has been the proud parent of a motion and has consented to postpone it for the time being is apt to bring it up again at a later time. He does not surrender it readily. He wants to raise it and have it considered.

Of course, the records of the Convention are so sparse that we do not have all of these things. But I think it is reasonable to infer that they must have told Sherman and Morris that the problem would be dealt with when article IV came up for discussion.

I think that is a far more reasonable inference from the Sherman-Morris remark that to infer that the power with respect to boundary disputes was intended to confer a boundless power over cession of all territory by treaty.[1]

Nonmention is the more remarkable because such an exception would carve out an area of undefined magnitude from the power conferred, a matter which would affront the democratically mind who placed their faith in the House. It seems more reasonable to inf from the history that article IV, section 3(2), was designed to set rest the fears that territory might be ceded without the concurrence the House.

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[1] (From written statement-addendum p. 3.)
During the subsequent discussion of "The Legislature shall have power to dispose of * * * the territory * * *," it is singular that no mention was made of an exception for disposition under the treaty power.

The Attorney General cites an amendment proposed by the Vi ginia Ratification Convention as exhibiting the "awareness of tl Founding Fathers that the Constitution authorizes self-executin treaties disposing of the territory and property of the United States

This was a proposal for an amendment:

> No commercial treaty shall be ratified without the concurrence of the me bers of the Senate [not merely of those present] and no treaty ceding, co tracting * * * the territorial rights or claims of the United States * * * sha be made, but in cases of extreme necessity; nor shall any such treaty be ratifi without the concurrence of three-fourths of the whole number of the membe of both Houses respectively.

This is stepping up from two-thirds of the Senate and a majority c the Congress to three-fourths of both Houses. (A.G. at p. 7; 3 Ellio Debates on the Federal Constitution 660.)

The Attorney General's reading paradoxically transforms Virginia anxiety to have greater safeguards—that is, three-fourths of bot Houses rather than the bare majority that satisfies article IV—into a argument for excluding the House altogether.

Like the earlier remarks, the Virginia proposal testifies to the im portance that the Founders attached to the disposition of territory—n cession except "in cases of extreme necessity"—and it counsels agains reading the equivocal "treaty-making" to encroach upon the "power t dispose" that requires the vote of both Houses, not merely the Senat

In any event, it may be asked, should the post-Convention view o one State—which was not adopted even when they drafted the Bill o Rights and had all sorts of amendments thrust upon them—should tha view be permitted to override the plain terms of article IV?

Hugh Williamson, a delegate to the Convention, wrote to Madiso some 9 months after its close, to recall to him: "a Proviso in the ne System which was inserted for the express purpose of preventing majority of the Senate * * * from giving up the Mississippi. It is pro vided that two-thirds of the members present in the Senate shall b required in making treaties * * *." (A.G. at p. 7–8; 3 Farrand 306- 307.)

The Mississippi presented a gnawing boundary question whicl threatened the expansion of the West and was only settled by the Lou isiana Purchase. Boundary treaties do not really involve the disposi tion of territory or property of the United States but the adjustmen of conflicting claims, even when some believe their claims to be mor valid than those of the opposing party.

To my mind, the history is at best inconclusive; the remarks quote by the Attorney General are confined to adjustment of boundary dis putes, with one exception—the hasty remarks by George Mason—b treaties of peace.

Boundaries are settled not by treaties generically but by treaties o peace which are peculiar treaties. Treaties of peace present specia problems, and such citations do not add up to general concurren jurisdiction over the disposition of Government territory or property

To go beyond such territorial adjustments collides with the rationale of *Pierson* v. *Ray*, 386 U.S. 547, 554–555 (1967), in an opinion written by Chief Justice Burger.

With respect to the common law immunity of judges from suit for acts performed in their official capacity, the Court declared:

> We do not believe that this settled principle was abolished by section 1983, which makes liable "every person" who under color of law deprives another of his civil rights * * * we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Mark that the all-inclusive "every person" is much more inclusive than the treaty power. "Every person" was held not to curtail an existing common law immunity in the absence of a specific provision. The more equivocal treatymaking power demands an even more exacting standard. Before it be concluded that it in any way diminishes the explicit grant in the Constitution itself to Congress of "power to dispose" of territory, a clearly expressed intention to do so under the rationale of *Pierson* v. *Ray* is required. That requirement is not satisfied by the random remarks collected by the Attorney General.

Finally, point 3. These are some arguments that have been made earlier by Hansell and Erickson, and with all due respect, I had not taken them seriously. But now they carry the weight of the Attorney General's imprimatur, and I felt they called for notice.

The Attorney General concedes that: "the specific power granted to the House of Representatives and Congress in fiscal matters (art. I, sec. 7, clause 1 and art. I, sec. 9, clause 7, money bills and appropriations power) preclude making treaties self-executing to the extent that they involve the raising of revenue or the expenditure of funds. Were it otherwise, President and Senate could bypass the power of Congress and in particular of the House of Representatives over the purse strings." (A.G. at p. 45.)

Now, sections 9 and 7 are couched in quite dissimilar terms. One, section 9(7), is framed in terms of flat prohibition: "No money shall be withdrawn from the Treasury but in consequence of appropriations made by law * * *."

Section 7(1), on the other hand, merely provides that "All bills for raising revenue shall originate in the House." Yet the Attorney General reads section 7(1) to preclude the President and Senate from "bypass[ing] the power of Congress and in particular of the House of Representatives over the pursestrings."

What is there that distinguishes "All bills * * * shall originate in the House" from "The Congress shall have power to dispose * * * "? Why, if you cannot bypass "all bills shall originate in the House," can you bypass "Congress shall have the power"?

The impalpability of the distinction is underlined by the State Department's concession that "treaties may [not] impose taxes." Nothing in this article I, section 8(1), "The Congress shall have power to lay and collect taxes" distinguishes it from the article IV "The Congress shall have power to dispose * * *."

In my judgment, they are absolutely on a par.

Finally, if the President may not by treaty "bypass" the power of the House to originate revenue-raising bills, or the power of Congress to tax, no more may he "bypass" its "power to dispose" of the territory and property of the United States.

Gentlemen, with that, I will be pleased to answer your questions.

Senator **Allen**. We are called to a rollcall vote on the floor of the Senate. We are halfway through the rollcall. Senator Hatch and I must go over there.

So, suppose, if you do not object, we come back at 11 o'clock and ask you to respond to questions. Certainly we look forward to that.

Professor **Berger**. I will be happy, to the extent I can, to answer your questions. That will be fine.

[Recess taken.]

Senator **Hatch** [acting chairman]. The subcommittee will come to order. The Chairman was detained in a discussion on the floor of the Senate. He will return as soon as possible.

Professor Berger, I appreciated your testimony because it clearly evidences that you have spent a lot of time—effective time—in trying to resolve what I feel is one of the most important issues in America today.

Would you agree with me that this is an important issue of great magnitude with regard to the Constitution and executive power and the extension of executive power?

Professor **Berger**. Oh, yes, but I would be careful about one thing. I think you owe it to yourself also to note that my opinion does not proceed from political motivation. You really have to address it as a great constitutional issue which will have an impact over the years.

Senator **Hatch**. I agree with that. You and I are on opposite poles with regard to whether or not we should transfer the Panama Canal pursuant to these treaties. I think we have to have a new treaty that will do a lot more than what our 1903 treaty did. But I am not in agreement with you that the United States should surrender sovereignty over the canal.

Professor **Berger**. We do not have to get into that.

Senator **Hatch**. Yes, and I would like to suggest to you that the reason we invited you here is that, notwithstanding, immediate political considerations, we consider this to be a major constitutional question of great magnitude because it involves, in my opinion, an unprecedented extension of executive power by the Department of State. I do not think the President fully understands this problem at this point, and I am not certain that the American people clearly understand it.

But I think it is a blatant extension of the executive power to the detriment of the other two branches of Government and in particular, the Congress. Not too many people understand this issue because, frankly, it is a difficult one to understand. I am sure that many people will have read your statement many times before they will understand fully the momentous impact that your statement and analysis has on this question.

After days of hearings on this subject, I believe I can state that we are in agreement with your position that the full Congress must authorize the disposal of territory or property of the United States, even if such disposition is proposed to be accomplished by a treaty submitted to the Senate for ratification.

I note that the treaty of 1955 contains in several places a clause stating that insofar as a disposition of territory or property is contemplated, then such disposition is subject to the enactment of authorizing legislation by the Congress.

So, there is precedent even with regard to our previous arrangements with Panama which show the need for implementing or authorizing legislation by the Congress.

Professor BERGER. I would agree that a Panama treaty should contain a clause that this treaty is subject to congressional authorization as far as disposition of any property of the United States is concerned.

Senator HATCH. The question I really want to get into is this.

If there should be authorizing legislation, what would be the procedure that the President and the State Department should have followed? Let us assume that we are at a pretreaty stage.

What steps should the State Department and the President have taken prior to negotiating and signing these treaties?

Professor BERGER. Here you get into a field that is not nearly as clear as any of the matters I have been testifying about, about which one cannot speak categorically.

You recall at the very outset of our beginning as a nation, when the Jay Treaty was presented, Jefferson was Secretary of State and counseled President Washington, that inasmuch as the treaty would require appropriations by the House, he felt it would be safer to consult the House, notwithstanding that it could not be a participant in the negotiation of treaties.

We have to separate out the power of the President and the Senate to negotiation and ratify a treaty and the need for consent by the full Congress, including the House, to make an appropriation or disposition of property.

As I said, Jefferson argued that it would be wise to consult the House as they were going along.

But historically that has not been done.

Whether or not we have a clear constitutional mandate for that, I am not prepared to say.

Senator HATCH. I would suggest, although I agree with you that this s a hazy area, and that your suggestion is an after-the-fact suggestion, I would suggest that in the future if this is to be fully understood, that t would be important for the President to come to the full Congress for implementing rights, in other words, to grant him rights to go and negotiate a treaty and to bring it back for two-thirds ratification.

Difficulty is there also with that position because if you cannot ransfer property without consent of both Houses of Congress, then I hink it logically follows that after the treaty is entered into, that the ultimate treaty would have to be passed at least by majority vote of he House of Representatives.

Professor BERGER. You are going too far, Senator. By the same oken the Senate has to consent and ratify the treaty by two-thirds, and yet many treaties have been negotiated without even consulting he Senate. However, the Senate, as in the case of the Versailles Treaty, efuses to consent and upsets the entire applecart. It has that oppor-unity to do that.

We realize the extreme situation for the Senate or the House in do-ng that, but the power is there. That cannot be taken away.

I think, if I may suggest, you are taking on enough to require that he disposition be subject to the consent of the Congress.

Senator HATCH. So what you are saying——

Professor BERGER. Fight one fight at a time.

Senator Hatch. The way then to handle this problem is to put language in the treaty that the treaty itself is subject to the consent of Congress with the majority vote in the House of Representatives and two-thirds ratification by the Senate; is that right?

Professor Berger. That will arouse people in the State Department and in the President's office to the need for such consent. There is no sense in shutting your eyes to it. What is the sense of marching up the hill if you march back?

Senator Hatch. That is why the founding fathers wanted it there, so these matters would be debated and so the people's representatives would be considered in matters of cession of property and would have to stand up and vote.

Professor Berger. My off the top of my head reaction is this. I would be content to say, that is, to insert the provision you suggest in the treaty and let the matter be subject to further study and then make up your mind whether or not that is effective. If it is not effective, you can take further action. These constitutional issues are thorny. They cannot be decided offhand as you have learned from addressing yourself to this one.

Senator Hatch. That is right.

Professor Berger. If your experience proves that you really need consultation as to a disposition as the treaty is going along and being negotiated, then that is another story.

Senator Hatch. How would you recommend that the House of Representatives protect itself in this matter? If the President has taken the position that all he has got to have is a two-thirds ratification by the Senate as a result of the State Department's concurrent jurisdiction, then what steps might the House take to protect its rights, or their rights, that is, what steps should the House Members take to protect their rights?

TREATY IS VOID WITHOUT CONCURRENT ACTION BY HOUSE AND SENATE

Professor Berger. In my view any attempt of disposition without getting the concurrence of the Congress, including the House, would be void.

Senator Hatch. That is a strong statement.

Professor Berger. If I am right, if there is no "concurrent jurisdiction" to dispose of property in the executive branch if that power is exclusively in the Congress, then the President oversteps his bounds. That is unconstitutional, and if it is unconstitutional, it is void.

Senator Hatch. What you are saying is that even if the Senate ratifies this by a two-thirds ratification, and even if we go through all the process and everybody thinks we have a treaty, then it is void because the House did not agree to the property transfer.

Professor Berger. Yes; it seems to me that consent of the House to the disposition is required. I have tried to lay out the grounds for the view that there is no constitutional warrant for proceeding without such consent.

If you will permit candor on my part, I think that if the Senate were really solicitous, genuinely anxious about the preservation of the separation of powers, it could insist in the process of ratification itself, to consult with the House on a proposed disposition. It could say that the House has a role to play and the Senate would not ratify without that.

Senator HATCH. That is my position.

Professor BERGER. I do not think you will find much sympathy for it in the Senate. I would venture to predict that.

Senator HATCH. I think we have sympathy for it, but I am not sure we have majority sympathy for it. That is the problem.

That is because there seems to be very little interest in this issue. We have tried to bring it to the Senate's attention here in the subcommittee. More and more people are beginning to understand the problem. But I have asked people all over the country if they have heard about the constitutional problem here. They have not.

Professor BERGER. I had not thought about it myself until it was brought to my attention by Dr. McClellan of your staff who sent it to me and asked me to express an opinion.

Senator HATCH. I was with Dr. Richard Morris, the eminent U.S. historian who is the authority on the Jay papers last week at dinner. We were talking about Panama and these things. I said, "Of course, you have heard of one of the arguments that I have been making all over the country, but I cannot seem to get the media to understand how to present this side of the argument."

He said, "Goodness gracious, I never thought of it. That is a heck of a point. You are right."

Professor BERGER. I had not thought of it. I refused to give an off-the-cuff opinion. I was busy, but I offered to read the papers. I began to read them, and I went through a whole mess of the hearings and so on. It was a most interesting point.

I found problems along the road. I knew there was only one way to go about it—that was serious research and study.

Let me also say this. In saying what I did about the House, I want you to remember that I was at pains to defend the right of the Senate to be included in the negotiation of treaties because, No. 1, it became the practice of a succession of Presidents to deal cavalierly with the Senate and not to include them and not to confide in them.

There is a whole chapter in my book on executive privilege, 62 tightly documented pages to show that the phrase "Advise and consent" meant that the Senate had to be a participant every inch of the way.

So I fought for the rights of the Senate.

Senator HATCH. Yes, you have.

Professor BERGER. And, I have told the House committee and Chairman Zablocki "You fellows were excluded from treaty negotiations." That is the history. There is no question about it. It was confined exclusively to the Senate, but having said that, you have raised a different point—the disposal power.

On this, as on appropriations, they ought to be consulted. This is a big problem, but we do not have to meet it now. But at what point should they be consulted? I have learned to go step by step. You will have a famous victory if you establish that the Senate ought to insist on "subject to consent" of the House in the treaty before they ratify. They can write the ticket subject to the consent of Congress to the disposition. That is a simple solution.

Senator HATCH. I agree with you. I think the Senate should be consulted throughout the negotiations. This is one of the points we have been trying to make here. But I also believe the House should have been consulted step by step in every matter that involved a proposed disposition of U.S. property.

One of my points is this. And I have made this point in my speeches across America. Regardless of which point of view you have with regard to treaties—and I acknowledge there are sincere points of view on both sides and some of them have moment—but regardless of your point of view until we solve these constitutional problems, I do not see how any reasonable Senator could vote for ratification of a treaty which deprives their brethren in the House of rights, which decreases the Senate's rights in a very real sense, and which really establishes a very bad precedent extending and increasing the powers of the Executive to extremes never contemplated by the Founding Fathers.

Professor BERGER. It will haunt those who are closing their eyes to it down the years because it will be brought up by people who will succeed Hansell and Erickson. They will say they have a precedent. The Senate retreated, and in the future they will insist on it as a matter of Executive right.

Senator HATCH. Let me ask you this. As you could tell through the hearings, I agree with your position. Both Senator Allen and I have advanced this view very forcefully after, I think, extensive reading and study by us both.

I am certainly not as expert as you are, I am sure.

But there is, in my opinion, another constitutional issue here. There are a number, but there is at least one other major constitutional issue to which I would like for you to give some thought.

I think it also will intrigue you.

We are transferring, according to the State Department, somewhere around $9.8 billion of American property. As we view it, there are five different types of property that the United States has down there. There may be more, but there are at least five that I can name.

What I would like to do is this. In addition to the $9.8 billion of American property, we are giving the Panamanians $2.25 billion more in payments to be made out of tolls, allegedly, for the next 22½ years.

In addition to that, we are paying. It is a different form of payment. We will pay what it costs to maintain and operate the principal asset, the canal.

Professor BERGER. Is that in the treaty?

Senator HATCH. Yes; in the treaty and in the documents along with the treaty.

In addition, we are paying for our own management which I am not sure comes out of tolls or not, but I submit it will not come out of tolls but rather out of the Treasury. That cost will be the cost of our own management of the canal under these new treaties during the 23-year period.

In addition to that, we are going to give Panama $10 million per annum to operate the garbage collection and other municipal functions within the zone.

In addition to that, we are going by Executive agreement alone to loan $345 million to the Panamanians. There are other expenditures that are being made pursuant to these treaties that will also have to be made inevitably.

Professor BERGER. The treaties authorize it?

Senator Hatch. That is right.

Professor Berger. If authorized in the treaties, then it is up to the Senate.

Senator Hatch. Can we authorize all of these new payments without an appropriations bill which should originate in the House of Representatives?

Professor Berger. Before you get to that, it is up to the Senate to ratify or not. You have the power in the Senate to stop it dead in its tracks if you do not like these particular provisions.

Senator Hatch. But until we can educate our brethren to the point where they realize they must do that, then is there not another major constitutional violation here wherein we have new appropriations without the appropriations bill originating in the House of Representatives as mandated by the Constitution?

Professor Berger. Senator, it is my habit never to shoot from the hip.

Senator Hatch. We understand.

Professor Berger. I can speak confidently about something to which I have addressed myself and have studied. It is one man's opinion and good only as far as the documentation is concerned.

But this is too involved and too difficult a question to answer hastily. It needs serious study. I, myself, would not find it possible to undertake it right now. I have other commitments.

It is certainly a question. I would agree.

Senator Hatch. You recognize it is a momentous question?

Professor Berger. $345 million looks like an awful lot of money to me.

Senator Hatch. Well, $9.8 billion is a lot of money also, and $2.25 billion is a lot and $10 million is a lot, too.

These are the principal two constitutional issues that are recognized issues by at least this committee which are issues involved in the Panama Canal treaty.

I am suggesting that until those two matters are cleared up that no thinking Senator should be voting to ratify these treaties.

Of course, we have No. three. I think there is a third argument that is very important. It may or may not involve constitutional implications. That is the myriad of ambiguities and misstatements and misinterpretations that presently exist in these treaties.

The fourth issue that might involve the Constitution is this. This issue happens to involve this one sheet of paper involving our "right" to intervene unilaterally to protect the neutrality of the Canal under the neutrality treaty and our "right" to have "expeditious transit". I refer to the document issued when the President and Mr. Torrejos got together and promulgated an unsigned joint communique. They say that this paper is going to resolve our difficulties in those two areas.

Of course, they do not answer in discussing expeditious transit as to who will determine what is an emergency warranting expeditious transit nor do they answer many other issues.

I submit that there may be some constitutional implications there as well. I admit that this is a complex area.

But they are saying that this paper rises to the dignity of the treaty, or at least they are saying we should not worry because they orally agreed.

I submit that an oral agreement reduced to a position paper without signature and without the force and will of the executive of our country and of the other country, does not rise to the dignity of treaty.

These are some of the technical problems that I have with these treaties.

Professor BERGER. When you argue that, you can make a grave misstep also. You then say that this is merely an executive agreement.

I am one of those who has inveighted against executive agreements.

In the field of international treaties and foreign relations, I do not believe there is a Presidential power to enter into executive agreements, except the President making necessary agreements that carry out treaty provisions or statutory provisions.

I appreciate your concern here. You have done your homework. I have not. I am in no position to express an opinion. I am content to be held to what I studied and to express an opinion on that.

Senator HATCH. I respect and appreciate that.

If you have any time, however, I would like you to consider these other questions.

Professor BERGER. In all honesty, Senator, I will not have. I am right now deluged.

Senator HATCH. You have performed a great service to the committee by addressing this one question, which is the paramount question.

Professor BERGER. I have been before your predecessor, Senator Ervin, whose friendship I enjoyed. I testified on other constitutional issues. I think that the respect for and the preservation of the constitutional mandates is absolutely indispensable to the maintenance of our democracy. I do not want to have anybody overstep those boundaries even for noble purposes.

Senator HATCH. I agree with that. I respect you for it. I think that adds weight to your testimony, that is, your statement that you are in favor of these treaties and that you would like to see them properly approved.

I submit that you have looked at both sides here and you have looked at the documents. You have come up with something that overrides your desire to have the treaties ratified. That is, how can we solve the constitutional dilemma most effectively and still not abrogate the rights given by the Constitution?

Professor BERGER. A man of my years has long since learned that he is not infallible. In fact, one of the great anxieties which not only scholars but lawyers share is the apprehension that they may overlook something or misinterpret something.

Should the State Department and Attorney General point out Berger's errors in this particular area, I will consider them. I think it would be useful for me to have an opportunity to comment.

As I said at the outset, I attach no weight to my mere opinion. I feel no matter how much work a man has done in the field of constitutional law, with each fresh problem it is like coming up to bat in the world series. It does not make any difference if you batted 100 percent yesterday or the last series, it is what you do at bat now.

I ask no more than respect for my documentation and my reasoning. I could be mistaken. If so, it would be the result of honest error and oversight.

You will find that I will immediately acknowledge those errors if they are pointed out. But at the same time I am accustomed to having wool pulled over the eyes. I know how to avoid it.

Senator HATCH. I think it would be fair to say, however, that this is the best your scholarship has been able to determine.

Professor BERGER. It represents a dispassionate honest effort arrived at after trying to read all the cases.

I have an appendix where I actually went to the length of studying every case that was cited for the *Holden* v. *Joy* dictum. I wanted to find out if it had any footing, never mind that it was a dictum.

If I misread the cases, and if the Department of State and the Attorney General want an opportunity to show that I have, then that is OK. Im I am wrong, I will confess error, and if they are wrong, I would like to point it out.

Senator HATCH. I would like to borrow your metaphor. I would suggest that you hit a homerun today. You have done this committee—and I think the country—a great service in helping us to understand this problem better. I understand it better now than at any time since the beginning of our deliberations, although inherently I felt the same way about these cases that you do.

I am deeply grateful to meet you and to hear your testimony.

Thank you very much.

Senator ALLEN. Professor Berger, we are deeply grateful to you for your fine testimony for which we commend you. We are highly honored by your appearance before our committee to give us the benefit of your views.

As a recognized authority on the Constitution, is it your considered opinion that the power given to Congress under article IV, section 3, paragraph 2 of the Constitution to dispose of territory and other property of the United States is an exclusive right, exclusive power in Congress?

Professor BERGER. Yes, and I would add that I base that opinion not on any claim of authority as a constitutional scholar—although I have been studying constitutional law for a long time—but I base it on a particular, painstaking, extended study of this very problem against the background of every case that has been cited by the various witnesses. It is an independent study.

My study of the cases has led me to conclude that the power is indeed exclusive.

If I am wrong, I would like to have it pointed out to me where I am wrong.

Certainly the face of the Constitution itself indicates that the power is exclusive and nothing has been summoned by the Department of State or the Department of Justice, in my judgment, that vitiates that view.

Senator ALLEN. Where the power is given to the Congress and an effort is made to establish concurrent jurisdiction, such justification of concurrent jurisdiction should be by clear and overwhelming proof; should it not?

Professor BERGER. I would exercise the word "overwhelming." I am satisfied with "clear."

I would say that certainly, in the teeth of this express power, there should be clear proof and, I would remind you Hansell or Erickson, I forget which, admitted that the question is not free from doubt. I consider that a mistake—to cut down explicit language where there are doubts is a left-footed approach to constitutional interpretation.

Senator ALLEN. You call attention to the fact that Mr. Hansell and Mr. Erickson rely a great deal on dicta in their testimony whereas you are able to cite direct holdings, rulings of the Supreme Court. Is that not true?

Professor BERGER. No. I think both sides have cited dicta, insofar as the precise question of the relation of article IV to the treaty power has never been adjudicated.

You have dicta about the treaty power which are far afield, and you have utterances that the power is exclusive but never in the framework of the treaty power.

I do not claim that the statements for exclusivity are any better than the dicta for concurrent jurisdiction.

What I do say is this. The exclusivity statements win support from the face of the Constitution by virtue of two cardinal rules of construction, the rule of express mention, and the rule that the special governs the general. Remember when we do not have legislative history, these maxims, which are centuries old, help us to interpret.

That is why I think the case for the exclusivity statements is better. I do not think that Hansell and Erickson can bolster their dicta. I think I have been able to bolster the dicta favoring exclusivity.

Senator ALLEN. You cite *Wisconsin Central Railroad Company* v. *Price County*. You quote from the Supreme Court opinion that article IV implies an exclusion of all other authority over property which could interfere with this power vested in Congress or obstruct its excise.

Professor BERGER. That is true. That reflects the arguments based on maxims of construction. The mention of Congress alone implies that everybody else was excluded. The Court does not cite the maxim, but that, in effect, is what the statement relies on.

But it remains, nevertheless, as far as the treaty powers are concerned, a dictum. It was uttered in a nontreaty framework, and although it was not dictum as far as the particular holding was concerned, as far as the treaty power is concerned, we have to regard it as a dictum.

Mr. CHAIRMAN. May I interpolate: at the outset of my career I asked a sage, old practitioner what made a fine lawyer. He said, "Lots of scar tissue."

I hope I am a good lawyer by virtue of the fact that I have lots of scar tissue. [Laughter.]

Professor BERGER. So, I would say let us not get into a battle about "Our dicta are better than yours." I would prefer to take the opposite view to what Mr. Erickson and Mr. Hansell tacitly took. When they cite dicta, it becomes Holy Writ. When statements are cited for "exclusivity," then that becomes pure dicta. I do not want to get into their camp. Dicta for me are dicta. If dicta are going to have weight, it is because they reflect cardinal principles of constitutional construction.

Senator ALLEN. I notice you call attention to Mr. Justice Jackson who brushed aside testimony of representatives of the executive department even in a particular case where it had been his own statement.

Professor BERGER. He brushed aside his own statements as Attorney General. He said he was then just an attorney for a client.

REPRESENTING THE PRESIDENT

Senator **Allen**. So you think we might well then be skeptical of Mr. Hansell's testimony and Mr. Erickson's testimony and even that of the Attorney General inasmuch as they are representing their client who is the President, whereas you have no interest in the matter other than as a student of the Constitution?

Professor **Berger**. I may refer you to my book on "Executive Privilege" where I examine Attorney General Rogers' opinion to the President for uncontrolled discretion to withhold information from the Congress. That examination has been called by people like former Solicitor General Archibald Cox a devastating critique.

So, I have learned from experience to take Attorneys General opinions involved in these conflicts between Presidents and Congress with what Samuel Goldwyn called a bushel of salts.

Senator **Allen**. One whole chapter of your book, "Executive Privilege," is devoted entirely to one of the issues of concern of the committee.

Would you have any objection if we reprinted that in the record; that is, that chapter of your book? [1]

Professor **Berger**. I would be pleased. I think it could be useful to you as you grapple with the problems of foreign relations and with the problems of executive agreements. I devoted the better part of a whole year to researching that question and minutely going over it every inch of the way.

I want to emphasize that I do not claim infallibility, that I try honestly to look at the case for views that are opposed to the view that I arrive at and to examine them. I do not brush them under a rug. You will find that to be true of that chapter. I think it might be useful, especially on the executive agreements.

Senator **Allen**. I think it will also. You would have then no objection to our using other portions of your book as an addendum to your testimony?

Professor **Berger**. That will be fine.

Senator **Allen**. Very well. Without objection, so ordered.

EXECUTIVE AGREEMENTS

Professor Berger, you are recognized, as I have stated, as a leading authority on questions involving executive privilege and the related issues associated with the so-called executive agreements.

The committee has learned from the Department of State that it is proposed in one of the executive agreements to lend or grant to the Republic of Panama $345 million without the advice or consent of the Senate. For that matter, it is without appropriation by the Congress.

This executive agreement does not reference either of the Panama Canal Treaties, and, therefore, purports to be operative and effective on its own. What would be your view of this or similar executive agreements?

Professor **Berger**. In the chapter which we spoke about—I believe it is chapter 5—I treated executive agreements at great length.

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[1] See p. 375 for ch. 5 of Professor Berger's book "Executive Privilege: A Constitutional Myth."

I concluded—and there are other scholars of constitutional law who believe—that executive agreement historically and constitutionally should be limited to carrying out the details of a treaty and to implementing a statute. The practice in the last 20 or 30 years has gone beyond that as a subterfuge to bypass the Senate. The treaty-making power was plenary, as Hamilton said. You will find the quotation by Hamilton in my chapter 5. They covered every possible exigency of foreign relations. Everything in foreign relations was to be governed by treaty.

I may remind you, Mr. Chairman, that Senator William Fulbright, who was chairman of the Senate Foreign Relations Committee, bitterly complained that international agreements involving trivia were submitted to them in the form of treaties whereas grave matters involving billions of dollars were put in the shape of executive agreements.

I would remind you that Senator Ervin attempted to get legislation which would bar the use of executive agreements. The Congress itself was at fault. They did not pass it. That battle ought to be renewed.

In my judgment, the Congress is derelict. The Senate is derelict when it sits supinely by and lets anything go by in the shape of an executive agreement just because of that label.

In my judgment, if the treaty itself does not authorize expenditure of $345 million, then an executive agreement cannot be considered to implement the treaty. It therefore requires an independent international agreement which must be cast in treaty form. The documentation for this I have furnished in my chapter on foreign relations.

Senator ALLEN. Thank you very much.

We are in the midst of another vote on the Senate floor. I do have one additional question which I would like to propound to you.

I will ask Mr. Crommelin of the staff to work with you so that you can give your response for the record. You would not then be inconvenienced by that. We would like you to give him your answer.

This is No. 3 of my written questions to be propounded to you. With that agreed upon, Professor Berger, we will conclude and I wish to express to you again the thanks of the committee and my own personal thanks for your kindness and your cooperation and for your very fine and persuasive testimony.

Thank you.

Professor BERGER. Thank you, sir.

Mr. CROMMELIN. Professor Berger, the chairman's question reads as follows:

> There are other executive agreements associated with these proposed Panama Canal Treaties, but these additional executive agreements at least reference the treaty and do not purport to come into force until the treaty itself is ratified.
>
> Nevertheless, members of the committee are deeply concerned that these plenary executive agreements which contain the real meat of the Panama Canal arrangements would, after ratification, in effect turn over to the Department of State virtually every aspect of our relations with Panama since these executive agreements could presumably be modified and amended by the Executive more or less at will from the time of ratification forward.
>
> Some Members of the Senate have considered introducing an amendment to the proposed treaties which would incorporate by reference all of the extrinsic executive agreements. Do you have an opinion as to the effect of such an incorporation by reference—in other words, would it preserve the future role of the Senate in advising and consenting to proposals advanced by the Executive in connection with our relations with Panama?

Professor **Berger**. Traditionally incorporation by reference merely means "as if the pages incorporated" are in the treaty. If the pages have the effect that you attribute to them, incorporation by reference does not limit that effect.

I would not want to speak about the effect because you have outlined some really complicated issues here. One needs to study them.

I did not find as much difficulty with the question that the chairman asked about the $345 million by executive agreement which does not come under the treaty. But you do raise some questions that one would want to study carefully. However, I am not equipped to deal from the hip with those. I would not want to do so.

Mr. **Crommelin**. Thank you, sir, very much. You have been very helpful to the committee. The staff has enjoyed working with you also.

The committee now stands adjourned subject to the call of the Chair.

[Whereupon, at 11:35 a.m., the subcommittee adjourned.]

[Professor Berger's prepared statement and chapter 5 from his book, "Executive Privilege: A Constitutional Myth," follows:]

STATEMENT BY
PROFESSOR RAOUL BERGER
BEFORE THE
SENATE SUBCOMMITTEE ON SEPARATION OF POWERS

HEARINGS ON THE
PANAMA CANAL TREATIES

WASHINGTON, D.C.
November 3, 1977

Addendum to follow

Statement by Professor Raoul Berger
Before the Senate Subcommittee on Separation of Powers
Hearings on the Panama Canal Treaties
Washington, D.C., November 3, 1977

You have invited me to comment on the relation between the Article IV, Section 3 (2) power of Congress to dispose of property of the United States and the treaty power, in light of the statements respecting the relation by Herbert J. Hansell, Legal Advisor, Department of State,[1] and Ralph E. Erickson, Deputy Assistant Attorney General.[2] Although I am in favor of the Panama Canal Treaty, I share your solicitude for the preservation of constitutional boundaries and your concern lest the function committed to Congress by diminished. I have long held the conviction that all agents of the United States, be they Justices, members of Congress, or the President, must respect these boundaries. No agent of the people may overleap the bounds of delegated power. That is the essence of constitutional government and of our democratic system.

Long experience has led me to be skeptical of arguments by representatives of the Executive branch when they testify with respect to a dispute between Congress and the President, for they are then merely attorneys for a client, the President. It was for this reason that Justice Jackson dismissed his own prior statements in the capacity of Attorney General as mere advocacy, saying, a "judge cannot accept self-serving press statements for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."[3] The Hansell-Erickson testimony did not serve to diminish my skepticism.

The effect of these hearings ranges beyond the Panama treaty. The Panama cession will constitute a landmark which, should the State Department prevail, will be cited down the years for "concurrent jurisdiction" of the President in the disposition of United States property. Acquiescence in such claims spells progressive attrition of Congressional powers; it emboldens the Executive to make ever more extravagent claims. I would remind you that Congressional acquiescence encourages solo Presidential adventures such as plunged us into the Korean and Vietnam wars. Congressional apathy fostered the expansion of executive secrecy. Then as now the State Department invoked flimsy "precedents," for example, the pursuit of cattle rustlers across the Mexican border, to justify presidential launching of a full scale war.[4] If Congress slumbers in the face of such claims it may awaken like Samson shorn of his locks.

Earlier judicial statements that this or the other executive practice has been sealed by long-continued Congressional acquiescence[5] need to be reexamined in light of more recent judicial opinions, more conformable to the Constitution, that Congress may not abdicate its powers,[6] and a fortiori, it cannot lose them by disuse,[7] that usurpation can not be legitimated by repetition.[8] Senatorial insistence on respect for constitutional boundaries will warn the

Executive against encroachments on Congress' powers; it will alert foreign nations to the fact that treaties for the cession of United States property must be subject to the consent of the full Congress.

Mr. Erickson, addressing himself to the question whether Article IV, Section 3 (2), "pursuant to which Congress has the power to dispose of property of the United States is an exclusive grant of legislative power to the Congress or whether the Congress and the President and the Senate, through the treaty power, share that authority," handsomely states that "the answer to this question is not simple and altogether free from doubt."[9] That doubt counsels against encroachments on a power explicitly conferred on Congress; a clear case for establishment of "concurrent jurisdiction" is needed in the teeth of that express grant.

In support of the claim that the President and Senate enjoy "concurrent power" to dispose of United States property, Messrs. Hansell and Erickson invoke a melange of dicta, without weighing even stronger statements that Congress' disposal power is "exclusive." Thus the Supreme Court declared that Article IV "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."[10] Echoing such judicial statements, an opinion of the Attorney General stated in 1899 that "The power to dispose permanently of the public lands and public property in Puerto Rico rests in Congress, and in the absence of a statute conferring such power, can not be exercised by the Executive Department of the Government."[11]

Such statements respond to two cardinal rules of construction. First there is the rule that express mention signifies implied exclusion, which the Supreme Court has employed again and again: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[12] The rule was invoked by the Founders; for example, Egbert Benson said in the First Congress, in which sat many Framers and Ratifiers, that "it cannot be rationally intended that all offices should be held during good behaviour, because the Constitution has declared [only] one office to be held by this tenure."[13] The fact, emphasized by Hansell, that "The property clause contains no language excluding concurrent jurisdiction of the treaty power" is therefore of no moment. Having given Congress the power to dispose of public property, it follows that the President and Senate were "impliedly excluded" therefrom. Second there is the settled rule that the specific governs the general:

> where there is in an act a specific provision relating to a particular subject, that provision must govern in respect to that subject as against general provisions in other parts of the act, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.[14]

In terms of the present issue, the specific power of disposition governs the general treaty provision.

Under these rules it is of no avail that, according to

Hansell, "there is no restraint expressed in respect to dispositions" in the treaty power itself. For this Mr. Hansell relies on Geofroy v. Riggs:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the ...departments....[15]

Only the treaty power is "expressed"; Geofroy does not call for express restraints -- it suffices that they can be found in the Constitution. The "implied exclusion" is "found" in the Constitution by virtue of the express grant of disposal power to Congress under the rule of express mention, and of the fact that the general treaty power is limited by the special Congressional power of disposition. These principles are reflected in the Supreme Court's statement in Sioux Tribe of Indians v. United States:

> Since the Constitution places the authority to dispose of public lands exclusively in Congress, the Executive's power to convey any interest in the lands must be traced to Congressional delegation of its authority.[16]

To this the State Department responds that Sioux Tribe "did not deal with the relation between the treaty power and the Congressional power under Article IV, Section 3, cl.2;" Hansell labelled it "dicta."[17] By this test the Hansell-Erickson collection of dicta falls to the ground, for almost all were not uttered in the context of that relation.

The Executive branch employs a double standard -- what is dictum when the language is unfavorable to it becomes Holy Writ when the dictum reads in its favor. Erickson, for example, tells us that

> Jones against Meehan is cited as an example by reason of the quote and the language there, which it seems to me is of significance, irrespective of the particular facts involved.[18]

Messrs. Erickson and Hansell can not have it both ways. In truth, dicta carry little weight when a particular issue has not been decided. Chief Justice Marshall dismissed his own dicta in Marbury v. Madison when they were pressed upon him in Cohens v. Virginia, 19 U.S. 264, 399 (1821), on the ground that dicta do not receive the careful consideration accorded to the question "actually before the court." The statements here quoted respecting "exclusivity" carry weight because they reflect traditional canons of construction. The foregoing considerations should suffice to dispose of a number of other Hansell-Erickson arguments for "concurrent jurisdiction," but I shall consider them for the sake of completeness.

To escape from the exclusivity of Congress' disposal power Mr. Erickson argues,

> To begin with, Article IV, Section 3, clause 2, uses the same terminology, "Congress shall have power," as Article I, Section 8, which in our opinion, permits treaty provisions relating to such matters to be self-executing [i.e., without Congressional action], at least to the extent that the inherent character of the power or other constitutional provisions do not make the

> power exclusive to Congress.[19]

Erickson's qualification is a concession that some Article I powers can not be concurrently exercised by the President. The Department of State concedes that "treaties may [not] impose taxes."[20] Why is that power more "inherently" exclusive than such other Article I, Section 8 powers as the power to establish post offices, to provide and maintain a navy, to declare war, to coin money, etc., all of which manifestly can not be exercised by treaty. Erickson proves too much.

Second, he urges,

> Article IV, Section 3, clause 2, is included in a portion of the Constitution which deals with the distribution of authority between the Federal and State governments. It does not purport to allocate powers exercisable by Congress or pursuant to treaty.[21]

But Section 3 (2) unmistakably does "allocate powers exercisable by Congress": "The Congress shall have power to dispose of ... property belonging to the United States." Hansell argues that the placement of the property article in clause 4... provides strong evidence that the property clause does not restrict the treaty power."[22] That the "placement of a power in one or another Article is without significance for its scope is readily demonstrable: (a) "Congress shall have power to declare the punishment of treason" is located in the Judiciary Article III; (b) Congress' powers to make "exceptions and regulations" respecting the Supreme Court's appellate jurisdiction is lodged in Article III, Section 2;

(c) The provision that "Congress may determine the time of choosing the electors" is placed in the Executive Article II, Section 1 (4). Does this authorize the President by treaty to declare the punishment of treason, to regulate the Court's appellate jurisdiction, or to interpose in the choice of electors? Whether located in Article I or Article IV, "Congress shall have power" means one and the same thing -- the power resides in Congress, not in the President. It needs constantly to be borne in mind that the President has circumvented Senate participation in treaty-making by affixing the label "Executive Agreements" to treaties, without constitutional warrant,[23] so that claims made on behalf of the Senate and the President can be turned to his own advantage.

Mr. Hansell also attaches significance to the close linkage between the Article IV "power to dispose" and "the power to make all needful rules and regulations" respecting the Territory or other property belonging to the United States, and cites Geofroy v. Riggs for the proposition that "the treaty power can be used to make rules and regulations governing the territory belonging to the United States, even in the District of Columbia."[24] Geofroy presented the question whether a citizen of France could take land in the District of Columbia by descent from a citizen of the United States. Local law withheld the right, but in keeping with national solicitude for protection of citizens abroad, a treaty provided for reciprocal rights of inheritance in such circumstances for citizens of both signatories. In consequence the treaty overrode the local provision; but this hardly stretches to the "making of rules and regulations" by treaty for the District of Columbia. Were this true, the President could by treaty take over the governance of the District of Columbia, in spite of the Article I, Section 8 (17) provision that "The Congress shall have power to exercise exclusive jurisdiction in all cases whatever over such district." Assume notwithstanding that the treaty power does indeed comprehend the "making of rules and regulations governing the ...District of Columbia," does the "close" linkage with the "power to dispose" comprehend a disposition of the White House by treaty? Such arguments verge on absurdity.

Messrs. Hansell and Erickson have cited a string of cases in support of "The power to dispose of public land...by treaty."[25] Some, such as Holden v. Joy, 84 U.S. 211 (1872), and Jones v. Meehan, 175 U.S. 1 (1899), have frequently been cited in your hearings. Let me begin with Hansell's citation of Missouri v. Holland, 252 U.S. 416 (1920), for it quickly illustrates how far-fetched are the State Department's interpretations. Missouri v. Holland arose out of a State challenge to the treaty with Great Britain for the protection of migratory birds which annually traversed parts of the United States and of Canada. Justice Holmes, addressing the argument that the treaty infringed powers reserved to the States by the Tenth Amendment, stated,

> Wild birds are not in the possession of any one, and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State, and in a week a thousand miles away.[26]

Consequently the State could assert no "title" in migratory birds. By the same token, the United States could lay no claims to "ownership" of the birds, and Missouri v. Holland is therefore wholly irrelevant to the power by treaty to dispose of property belonging to the United States.

Holden v. Joy and Jones v. Meehan will repay close analysis because they involve Indian treaties which constitute one of the pillars of the argument, to quote Erickson, that "the United States can convey its title by way of self-executing treaty and that no implementing legislation is necessary."[27] To begin with Jones, both Hansell and Erickson quote: "It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States."[28] The treaty had "set apart from the tract hereby ceded [by the tribe] a reservation of six hundred and forty acres..." for an individual Indian; and the issue was what kind of title did he take. The Court quoted from an opinion of Attorney General Roger Taney, destined before long to succeed Chief Justice Marshall:

> these reservations are excepted out of the grant made by the treaty, and did not therefore pass with it; consequently the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title.[29]

The Court held that "the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple."[30] That explanation presumably responded to the fact that tribal lands were generally held in common; individual titles were all but unknown, so that such title had to be secured through the machinery of the treaty. But that is far from a disposition of government land because, as Taney explained, the "reserved" title remained in the Indians. Many, if not most, of the cases of Indian treaties involve just such "reserve" provisions.[31]

The quotation from Holden v. Joy, Erickson acknowledges, is dictum; notwithstanding Hansell relies on it as "a clear statement of the law"[32]:

> it is insisted that the President and the Senate, in concluding such a treaty, could not lawfully covenant that a patent should be issued to convey lands which belonged to the United States without the consent of Congress, which cannot be admitted. On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.[33]

What bearing the last clause has on Congress' "power to dispose" of public lands escapes me; this Delphic utterance surely does not overcome the clear terms of Article IV. As to the "many authorities," the Court's citation could hardly be farther afield. To avoid cluttering this statement with a minute analysis of each case cited by the Court for the assertion that "a treaty may convey to a grantee a good title ... without an act of Congress," I have abstracted them in an appendix attached hereto, so that you may see for yourself that half of the cases thus cited are altogether irrelevant, and that the rest concern "reserves" under which, as Taney observed, no title had passed to the United States but remained in the given Indians. In considering such dicta, it is well to bear in mind Chief Justice Taney's statement that the Court's

> opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[34]

By that standard the Holden dictum is no authority at all.

The inappositeness of Holden is underscored by the facts. In May, 1828, and February, 1833, "the United States agreed to possess the Cherokees of seven million acres of land west of the Mississippi." It "was the policy of the United States to induce Indians...to surrender their lands and possessions to the United States and emigrate and settle in the territory provided for them in the treaties," so an exchange of land was provided. But a third treaty, that of December, 1835, proved necessary, whereby the Indians ceded their lands to the United States in consideration of $5,000,000 to be invested in the manner stipulated. The Indians considered that the prior treaties, confirmed by the new, did not contain a sufficient quantity of land, so the United States agreed to convey an additional tract in consideration of $500,000 to be deducted from the $5,000,000.[35] This may be viewed either as a purchase and sale or an exchange: "the Cherokees were competent to make the sale to the United States and to purchase the lands agreed to be conveyed to them..."And the transaction was authorized by the Act of 1830, which empowered the President to set aside land west of the Mississippi for the reception of such tribes as chose to emigrate, and to "exchange" such lands with any tribe.[36] The 1830 act served to ratify the Act of 1828, and "ratification is equivalent to original authority"[37]: "It is well settled that Congress may...'ratify...acts which it might have authorized'...and give the force of law to official action unauthorized when taken."[38] Although the subsequent 1833 and 1835 treaties differed in some particulars from the authorization, the purpose was the same -- "to induce the Indians...to emigrate and settle in the country long before set apart for that purpose."[39] When, therefore, the Court, speaking to the contention that the President and the Senate "could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress," stated that "a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it," it was making a statement that was unnecessary to the decision, because Congress _had_ authorized the conveyance.

As to other treaties, Hansell tells us, "the precedents look two ways." Some have been "contingent upon congressional authorization." The "precedents supporting the power to dispose of property by treaty alone," he states, "can be found in the boundary treaties with neighboring powers, especially in the treaties between the United States and Great Britain of 1842 and 1846 for the location of our northeast and northwest boundaries..."[40] Settlement of boundary disputes are not really cessions of United States property. The Oregon boundary dispute proceeded from an inflated claim: "Fifty-Four Forty or Fight"; the British, on the other hand, claimed land down to the forty second parallel. Only when the dispute was settled by treaty -- at 49 degrees -- could either party confidently assert that it had title.[41] Consequently, as Samuel Crandall, a respected commentator, stated, "A treaty for the determination of a disputed line operates not as a treaty of cession, but of recognition."[42]

Among other examples of alleged treaty transfers of property, Hansell instances the return to Japan of the Ryukyu Islands.[43] By Article III of the 1951 Treaty of Peace with Japan, the United States received the right to exercise "all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of those islands..." While Japan renounced, in Article II, "all right, title and claim" to various territories, it made no similar renunciation with respect to the Ryukyus.[44] Quoting the Legal Advisor of the State Department, that "sovereignty over the Ryukyu Islands... remains in Japan...", a District Court stated that "Sovereignty over a territory may be transferred by an agreement of cession," but it concluded that there had been no cession.[45] The Fourth Circuit Court of Appeals quoted a statement by Ambassador John Foster Dulles, a delegate to the Japanese Peace Conference, that the aim was "to permit Japan to retain residual sovereignty," and held that the treaty did not make "the island a part of the United States, and it remains a foreign country for purposes of" the Federal Tort Claims Act.[46]

"In the history of transfers of property to Panama," Hansell tells us, "we have had a mixed practice."[47] By the 1903 Panama Convention, Panama granted to the United States "all the rights, power and authority within the Zone...which the United States would possess _if_ it were the sovereign of the territory...to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority..."[48] The words "_if_ it were sovereign" signal an intent to stop short of a cession of sovereignty. That is confirmed by an _Opinion of the Attorney General_. Considering the Tariff Act levy of duties on articles imported "into the United States or into any of its possessions," he stated that "the Canal Zone is not one of the possessions of the United States within the meaning of that term as used by Congress in the tariff act, but rather is a place subject to the use, occupation, and control of the United States for a particular purpose."[49] In _Luckenbach S.S. Co. v. United States_, Chief Justice Taft stated, "Whether the grant in the treaty amounts to a complete cession of territory and dominion to the United States or is so limited as to leave titular sovereignty in the Republic of Panama, is a question which has been the subject of diverging opinions," which he found it unnecessary to decide,[50] and is therefore still open. Instead he relied on a "long continued course of legislation and administrative action [that] has operated to require that the ports in the Canal Zone are to be regarded as foreign ports within the meaning" of the Act governing the transport of "mail between the United States and any foreign port,"[51] itself a hint that the Panama Treaty is no more a cession than the Japanese Treaty respecting the Ryukyus.

It does not follow, however, that the interests of the United States do not constitute "property of the United States." The grant of "use and occupation...in perpetuity" constitutes "property" no less than the familiar lease of realty for 99 years. Then there are the installations that cost billions of dollars. Disposition of these no less requires the consent of Congress than does that of territory. In 1942, the President by Executive Agreement promised to transfer certain installations to Panama subject, however, to Congressional approval.[52] A similar provision is to be found in the Treaty of 1955.[53] These are executive constructions that speak against Messrs. Hansell and Erickson.

In sum, Messrs. Hansell and Erickson have failed to make out a case for "concurrent jurisdiction" with Congress in the disposition of United States property. If the President is to fly in the face of the express "power of Congress to dispose" it must be on a sounder basis than the arguments they have advanced. In my judgement, the Panama Treaty should contain a provision making it subject to approval of the Congress.

Footnotes

1. Hearings on the Panama Canal Treaty before the Senate Subcommittee on Separation of Powers (95th Cong. 1st Sess.) Part II, p.3 (July 29, 1977), hereafter cited as Hansell.

2. Hearings before the House Subcommittee on the Panama Canal on "Treaties Affecting the Operations of the Panama Canal," (92 Cong. 2d Sess.) p.95 (December 2, 1971), hereafter cited as Erickson.

3. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647 (1952), concurring opinion.

4. R. Berger, Executive Privilege: A Constitutional Myth 75-88 (1974).

5. Congress "uniformly and repeatedly acquiesced in the practice." "It may be argued that while the facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long continued action of the Executive Department -- on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." United States v. Midwest Oil Co. 236 U.S. 459,471 (1915). But as Justice Frankfurter later declared, "Deeply embedded traditional ways of conducting a government cannot supplant the Constitution or legislation..." Youngstown Sheet, supra, n.3 at 610, concurring opinion.

6. Panama Refining Co. v. Ryan, 293 U.S. 388,421 (1935).

7. United States v. Morton Salt Co., 338 U.S. 632,647 (1950).

8. "That an unconstitutional action has been taken before surely does not render that same action less unconstitutional at a later date." Powell v. McCormack, 395 U.S. 486, 546-547 (1969). Zweibon v. Mitchell, 516 F.2d 594,616 (D.C. Cir. 1975): "there can be no doubt that an unconstitutional practice, no matter how inveterate, cannot be condoned by the judiciary." United States v. Morton Salt Co., 338, U.S. 632, 647 (1950): "nonexistent powers can [not] be prescripted by an unchallenged exercise..."

9. Erickson 97.

10. Wisconsin Cent. R.R. Co. v. Price County, 133 U.S. 496, 504 (1890); see also Swiss Nat. Ins. Co. v. Miles, 289 Fed. 571, 574 (App. D.C. 1923).

11. 22 Op. Atty. Gen., 544, 545 (1899). 2 J. Story, Commentaries on the Constitution of the United States, Section 1328, p. 200 (4th ed. 1873): "The power of Congress over the public territory is clearly exclusive and universal..." Cf. Osborne v. United States, 145, F. 2d 892, 896 (9th Cir. 1944).

12. Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929); T.I.M.E. v. United States, 359 U.S. 464,471 (1959): "we find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I [for railroads] were wholly omitted in the Motor Carrier Act."

13. 1 Annals of Cong. 505 (2d ed. 1836) (print bearing running head "History of Congress"); and see Alexander White, id. 517.

14. Swiss Nat. Ins. Co. v. Miller, 289 Fed. 570, 574, (App. D.C. 1923). Ginsberg & Son. v. Popkin, 285 U.S. 204, 208 (1932): "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." Buffum v. Chase Nat. Bank, 192 F.2d 58, 61 (7th Cir. 1951). In this light, the fact, stressed by Hansell, that the Framers contemplated that a treaty could affect "territorial" rights, Hansel 5, is not decisive, for the treaty would yet be subject to the special Congress "power to dispose." There is no evidence in the records of the Convention that the Framers intended in any way to curtail that power, or to give the President a share in it. Were the matter less clear, we should yet "prefer a construction which leaves to each element of the statute a function in some way different from the others" to one which causes one section to overlap another. United States v. Dinerstein, 362 F. 2d 852, 855-856 (2d Cir. 1966).

15. Hansell 4; 133 U.S. 258, 267 (1890), emphasis added. One might with equal force argue that no limitation on Congress' "power to dispose" is "expressed" in Article IV.

16. 316 U.S. 317, 326 (1942). Turner v. American Baptist Missionary Union, 24 Fed. Cas. (No. 14, 251) 344, 346 (C. Ct. Mich. 1852): "Without a law the president is not

authorized to sell the public lands...The [Indian] treaty, in fact appropriated the above tract of 160 acres for a particular purpose, but, to effectuate that purpose, an act of congress was passed."

17. Hansell 27, 22.

18. Erickson 105.

19. Id. 97.

20. Hansell 25.

21. Erickson 97.

22. Hansell 4-5, emphasis added.

23. Berger, supra n. 4 at 140-162.

24. Hansell 5.

25. Id.; Erickson 97.

26. 252 U.S. at 434.

27. Erickson 97.

28. Hansell 6; Erickson 97.

29. 175 U.S. at 12, emphasis added.

30. Id. 21.

31. See infra Appendix.

32. Erickson 97; Hansell 22.

33. Quoted by Hansell 5-6; 84 U.S. at 247.

34. *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849), dissenting opinion.

35. 84 U.S. at 237,238,241.

36. Id. 245, 238-239.

37. *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

38. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301-302 (1937).

39. 84 U.S. at 240.

40. Hansell 6.

41. S.E. Morison, Oxford History of the American People 538, 546-547 (1965).

42. S. Crandall, Treaties, Their Making and Enforcement 226 (2d ed. 1916).

43. Hansell 6.

44. 3 U.S.T. 3169, 3172, 3173.

45. United States v. Ushi Shiroma, 123 F. Supp. 145, 149, 148 (D. Hawaii, 1954).

46. Burna v. United States, 240 F. 2d 720, 721 (4th Cir. 1957).

47. Hansell 7.

48. Quoted Hearings, supra n. 1, Part I, p. 5, emphasis added.

49. 27 Op. Atty. Gen. 594, 595 (1909).

50. 280 U.S. 173, 177-178 (1930).

51. Id. 178.

52. "When the authority of the Congress...shall have been obtained therefore..." Agreement of May 18, 1942, 59 Stat. (Pt. 2) 1289.

53. Agreement of January 25, 1955, 6 U.S.T. 2273, 2278.

APPENDIX

I

Holden v. Joy: its citations for treaty power to dispose of property.

A. "Reserve" cases (title remains in Indians)

(1) United States v. Brooks, 51 U.S. (10 How.) 442 (1850).

Indian cession to United States; supplement to treaty provided that Grappe's representatives "shall have their right to the said four leagues of land reserved to them..." (450, 451). Held: treaty "gave to the Grappes a fee simple title to all the rights the [Indians] had in these lands..." (460).

(2) Doe v. Wilson, 64 U.S. (23 How.) 457 (1859). Indian treaty ceded land to United States, making reservations to individual Indians. "As to these, the Indian title remained as it stood before the treaty was made; and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners." (461-462).

(3) Crews v. Burcham, 66 U.S. (1 Black) 352 (1861). Cession by Indians with reserves (355). "The main and controlling questions involved in this case were before this court in the case of Doe v. Wilson, 23 How. 457..." (356).

(4) Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835). Prior to the Spanish cession of Florida to the United States, the Indians had made a cession to Spain, "reserving to themselves

full right and property" in certain lands. (749). Held: "by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained" title. (734, 756). Issue: title of purchaser from Indians to reserved lands.

(5) The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866). Treaty exchange of lands; Indians reserved lands for each individual (739, 741). Issue: was such land taxable by Kansas.

B. Irrelevant Cases

(1) Meigs v. McClung, 13 U.S. (9 Cranch) 11 (1815). Held: land claimed from defendants did not lie within territory ceded to the United States by the Indians. (17).

(2) Wilson v. Wall, 73 U.S. (6 Wall.) 83 (1967). Treaty provided that certain Indians would be entitled to 640 acres for self, and additional acres, roughly speaking, for each child. (84). Issue: whether an Indian held land governed by the latter clause in trust for his children. (86). Court said "Congress has no constitutional power to settle the rights under treaties except in cases purely political," (89) the clause quoted in Holden v. Joy. The reason, it explained, was that "The Construction of them is the peculiar province of the judiciary..." id. In other words, interpretations of treaties is for the courts.

(3) American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). Insurer brought a libel in the District Court, South Carolina, to obtain restitution of 356 bales of cotton carried by ship that was wrecked on the Florida coast. A Florida territorial court had earlier awarded 76% salvage to salvers, who sold the Canter. (540). Issue: did the territorial court have jurisdiction. No mention of grant by United States.

(4) Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Worcester, a white missionary was convicted of residing within Indian territory without a State license. The treaty with the Indians placed them under the protection of the United States, gave it the sole right of "managing all their affairs." Held: the Georgia act can have no force in the Indian territory. (561).

(5) Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). Re grants made in the ceded territory by Spain prior to January 24, 1815, the article provides "that those grants shall be ratified and confirmed like Indian "reserves ...the ratification and confirmation which are promised must be by the Act of the Legislature," i.e. Congress. (314-315).

II

Some additional Hansell citations for power to dispose by treaty.

(1) Reid v. Covert, 354 U.S. 1 (1957). Military Code

provided for trial by court martial of "all persons.. accompanying the armed forces" of the United States in foreign countries. Wife of Army Sergeant convicted by court martial in England of his murder. Held: Bill of Rights requires jury trial after indictment.

(2) Asakura v. Seattle, 265 U.S. 322 (1924). Seattle ordinance restricted pawnship license to United States citizen. (339-340). Japanese attacks as violation of treaty provision: citizens or subjects of each signatory "shall have liberty...to carry on trade, wholesale and retail... upon the same terms as native citizens or subjects..." (340). Held: can't deny the Japanese equal opportunity. (342).

(3) Santovicenza v. Egan, 284 U.S. 30 (1931). Italian subject dies in New York, leaving no heirs or next of kin. (351). Italian consul claims under "most favored nation" treaty clause. Held: The treaty-making power is broad enough" to cover "the disposition of the property of aliens dying within the territory of the respective parties..." Any "conflicting law of the State must yield." (40).

III

Some addtional Erickson citations for self-executing treaty conveyances.

(1) Francis v. Francis, 203 U.S. 233 (1906). Indian treaty ceded land to United States, but reserved certain tracts for use of named persons. (237). Quotes Jones v. Meehan; when

treaty makes "a reservation of a specified number of sections of land...the treaty itself converts the reserved sections into individual property..." (238). It was in these circumstances that the Court said, "a title in fee may pass by treaty without the aid of an act of Congress, and without a patent," (241-242) the reason being that title to the reserved land remained in the Indians.

(2) Best v. Polk, 85 U.S. (18 Wall.) 112 (1873). By Indian treaty "reservations of a limited quantity [of land] were conceded to them. (113). One section "had been located to an Indian." (113, 116). Thereafter, the United States issued a patent to James Brown. Held (117), "the Indian reservee was held to have a preference over the subsequent patentee."

Addendum to Statement by

RAOUL BERGER

before the

Subcommittee on Separation of Powers

of the Committee on the Judiciary

November 3, 1977

The statement by Attorney General Griffin B. Bell (hereafter cited as A. G.) before the Senate Foreign Relations Committee, September 29, 1977, reached me on Saturday afternoon, October 29, 1977, too late for inclusion of my comments in the body of my statement. Only three points made by the Attorney General seem to me to call for additional comment, and of these I shall speak in turn.

I

The Percheman Case

The Attorney General cites United States v. Percheman, 32 U.S. (7 Pet.) 511, 88-89 (1833) to prove that "the Court held self-executing certain clauses of the Florida Treaty with Spain which related to the regulation of property rights in newly acquired territory." A. G. at p. 10. At the cited pages it appears that Article 8 of the treaty provided,

> all the grants of land made before the 24th of January, 1818, by his Catholic Majesty...in the said territory ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands...

This Article, Chief Justice Marshall remarked,

> "must be intended to stipulate expressly for that security of private property which the laws and usages of nations would, without express stipulation, have conferred...Without it (Article 8), the title of individuals would remain as valid under the new government as they were under the old...the security of (pre-existing) private property was intended by the parties...

In short, the treaty provided that prior Spanish grants to private persons should be ratified and confirmed, a provision far removed from presidential "regulation" of public territory. Moreover, Foster v. Neilson, 27 U.S. (2 Pet.) 253. 314-315 (1829), a case cited by the Attorney General (A.G. at p. 3), held with respect to the self-same provision that "the ratification and confirmation which are promised must be by the Act of the Legislature," i.e. Congress. The citation to Percheman illustrates why I approach an Attorney General's statement with something less than awe.

II

Remarks in the Legislative History of the Constitution

(1) The Attorney General asserts that "the members of the Convention were fully aware of the possibility that a treaty might dispose of the territory or property of the United States," (A.G. at p. 5). He begins with the remark of George Mason in the Constitutional Convention: "The Senate by means of a treaty might alienate territory etc. without legislative sanction." A.G. at p. 6; 2 Farrand 297. This was during a debate on a resolution that "Each House shall possess the right of originating bills," when Mason seconded Strong's motion to "except bills for raising money for the purposes of revenue, or for appropriating the same." The Senate, said Mason, "could already sell the whole Country by means of Treaties," plainly an extravagant overstatement, made at a time when the treaty was not under discussion. His "alienate territory" remark may merely represent a strategic retreat from his untenable "sell the whole country" remark.

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ADDENDUM

There follow a group of utterances that have reference to boundary disputes, i.e. conflicting claims to ownership to be settled by treaties of peace.

(2) When the treaty power was under discussion, Williamson and Spaight moved "that no Treaty of Peace affecting territorial rights should be made without concurrence of two thirds of the [members of the Senate present]." A.G. at p. 6; 2 Farrand 543. Similarly, Gerry, speaking for a greater proportion of votes on "treaties of peace", said that here

> the dearest interests will be at stake, as the fisheries, territories, etc. In treaties of peace also there is more danger to the extremities of the Continent of being sacrificed than on any other occasion.

A.G. at p. 6; 2 Farrand 541. The "extremities of the Continent" has reference to boundary disputes which do not really involve territory owned by the United States.

(3) "Sherman and Morris proposed but did not formally move," the Attorney General states, "the following proviso,

> But no treaty (of peace) shall be made without the concurrence of the House of Representatives, by which the territorial boundaries of the United States may be contracted...

A.G. at p. 6; 4 Farrand 58. Farrand adds that "The subject was then debated, but the motion does not appear to have been made." Id. Why was the motion not made after debate? Presumably, the matter was postponed for consideration when Article IV, Section 3(2) would come up for discussion. During this subsequent discussion of "The Legislature shall have power to dispose of ... the territory...", it is singular that no mention was made of an exception for disposition under the treaty power. 2 Farrand 466. Non-mention is the more remarkable because such an exception would carve out an area of undefined magnitude from the power conferred, a matter which would affront the democratically minded who placed their faith in the House. It seems more reasonable to infer from the history that Article IV, Section 3(2) was designed to set at rest the fears that territory might be ceded without the concurrence of the House.

(4) The Attorney General cites an amendment proposed by the Virginia Ratification Convention as exhibiting the "awareness of the Founding Fathers that the Constitution authorizes self-executing treaties disposing of the territory and property of the United States":

> No commercial treaty shall be ratified without the concurrence of the members of the Senate [not merely of those present]; and no treaty ceding, contracting ... the territorial rights or claims of the United States ... shall be made, but in cases of extreme necessity; nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both Houses respectively.

A.G. at p. 7; 3 Elliot, Debates on the Federal Constitution 660. The Attorney General's reading paradoxically transforms Virginia's anxiety to have greater safeguards, i.e. three-fourths of both Houses rather than the bare majority that satisfies Article IV, into an argument for excluding the House altogether. Like the earlier remarks, the Virginia proposal testifies to the importance that the Founders attached to the disposition of territory--no cession except "in cases of extreme necessity"- and it counsels against reading the equivocal "treaty-making" to encroach upon the "power to dispose" that requires the vote of both Houses, not merely the Senate. In any event, it may be asked, should the post-Convention view of one State be permitted to override the plain terms of Article IV.

(5) Hugh Williamson, a delegate to the Convention, wrote to Madison some nine months after its close, to recall to him

> a Proviso in the new Sistem which was inserted for the express purpose of preventing a majority of the Senate ... from giving up the Mississippi. It is provided that two-thirds of the members present in the Senate shall be required in making treaties....

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A.G. at p. 7-8; 3 Farrand 306-307. The Mississippi presented a gnawing boundary question which threatened the expansion of the West and was only settled by the Louisiana Purchase. Boundary treaties do not really involve the disposition of territory or property of the United States but the adjustment of conflicting claims, even when some believe their claims to be more valid than those of the opposing party.

To my mind, the history is at best inconclusive; the remarks quoted by the Attorney General are confined to adjustment of boundary disputes, with one exception, by treaties of peace. Treaties of peace present special problems, and such citations do not add up to general concurrent jurisdiction over the disposition of government territory or property. To go beyond such territorial adjustments collides with the rationale of Pierson v. Ray, 386 U.S. 547, 554-555 (1967). With respect to the common law immunity of judges from suit for acts performed in their official capacity, the Court declared,

> We do not believe that this settled principle was abolished by Section 1983, which makes liable 'every person' who under color of law deprives another of his civil rights ... we presume that Congress would have specifically so provided had it wishes to abolish the doctrine.

Thus, the all-inclusive "every person" was held not to curtail an existing common law immunity in the absence of a specific provision. The more equivocal treaty-making power demands an even more exacting standard. Before it be concluded that it in any way diminishes the explicit grant to Congress of "power to dispose" of territory, a clearly expressed intention to do so is required. That requirement is not satisfied by the random remarks collected by the Attorney General.

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The Attorney General concedes that

> the specific power granted to the House of Representatives and Congress in fiscal matters (Article I, Section 7, clause 1 and Article I, Section 9, clause 7, money bills and appropriations power) preclude making treaties self-executing to the extent that they involve the raising of revenue or the expenditure of funds. Were it otherwise, President and Senate could bypass the power of Congress and in particular of the House of Representatives over the pursestrings.

A.G. at p. 4-5. Now, sections nine and seven are couched in quite dissimilar terms. One, Section 9(7), is framed in terms of flat prohibition: "No money shall be withdrawn from the Treasury but in consequence of appropriations made by law ...." Section 7(1), on the other hand, merely provides that "All bills for raising revenue shall originate in the House." Yet, the Attorney General reads Section 7(1) to preclude the President and Senate from "bypass[ing] the power of Congress and in particular of the House of Representatives over the pursestrings." What is there that distinguishes "All bills ... shall originate in the House" from "The Congress shall have power to dispose ...."? The impalpability of the distinction is underlined by the State Department's concession that "treaties may [not] impose taxes." Nothing in this Article I, Section 8(1) "The Congress shall have power to lay and collect taxes" distinguishes it from the Article IV "The Congress shall have power to dispose ...."

If the President may not by treaty "bypass" the power of the House to originate revenue-raising bills, or the power of Congress to tax, no more may he "bypass" its "power to dispose" of the territory and property of the United States.

PRESIDENTIAL POWERS: FOREIGN RELATIONS

SOMETHING of the wonder that suffuses a child upon learning that a mighty oak sprang from a tiny acorn fills one who peers behind the tapestry of conventional learning and beholds how meager are the sources of presidential claims to monopolistic control of foreign relations.[1] A grandiose formulation of such claims was enunciated by Woodrow Wilson, then president of Princeton University:

> One of the greatest of the President's powers . . . [is] his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President . . . may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.[2]

Wilson felt no need to advert to the constitutional problems presented by his statement, but apparently regarded it as dogma beyond need of demonstration. In his own person as President of the United States, Wilson was later to suffer a disastrous refutation when the Senate rejected the Versailles Treaty and League of Nations, which he had negotiated according to his dogma. The cost of presidential absolutism came high.[3]

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[1] The word "monopoly" is borrowed from the caption, "Negotiation a Presidential Monopoly" in Edward S. Corwin's revision of the official *Constitution of the United States of America—Analysis and Interpretation* 412 (Washington, 1953).

[2] Woodrow Wilson, *Constitutional Government in the United States* 77–78 (New York, 1908).

[3] Wilson was aware that the "spirit of the Constitution" called on the President to keep "himself in confidential communication with the leaders of the Senate while his plans are in course, when their advice will be of service to him and his information of the greatest service to them, in order that there may be veritable counsel and a real accommodation of views instead of a final challenge and contest"; ibid. 139–140.

Today, we are told, war is merely an instrument of foreign policy;[4] four times in this century presidential foreign policy has entangled us in great wars—World Wars I and II, Korea, and Vietnam.[5] As Wilson indicated, the President's foreign policy can present the nation with an all but irreversible fait accompli.[6] At a time when the havoc of war immediately threatens every man, woman, and child, when the sacrifices war requires in property, blood, even life itself, are staggering,[7] it needs to be asked whether the Founders intended to leave such risks for the decision of a single man.[8]

While such risks have been mounting, the executive tendency to shroud the conduct of foreign relations in secrecy has grown apace, as is exemplified by numerous "executive agreements" which are not even revealed to the Senate.[9] May information respecting the conduct of foreign affairs—for example, the disbursement of funds appropriated for defense[10] or for foreign aid[11] or the acquisition of foreign bases[12]—be withheld from Congress on the ground that congressional inquiry encroaches on presidential prerogatives?

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[4] "The military machine has simply become an instrument for achieving presidential power objectives." Henry Monaghan, "Presidential War-Making," 50 Bost. U. L. Rev. 19, 31 (1970); W. T. Reveley, "Presidential War-Making: Constitutional Prerogative or Usurpation?" 55 Va. L. Rev. 1243, 1245–1246 (1969). Clausewitz, the pioneer military theorist, regarded war as "a continuation of political commerce"; 1 C. von Clausewitz, *On War* [1832] 23 (London, 1966). Our war in Vietnam is the creature of presidential foreign policy. Secretary of State Rogers agreed that war is "the most disastrous" of "our foreign policies"; Fulbright Hearings 533.

[5] Corwin wrote, "Our three wars of outstanding importance prior to World War II were all the direct outcome of Presidential policies in the making of which Congress had but a minor part"; Corwin, *Total War* 13. For Franklin Roosevelt's prewar policy, see Morison 991–1001. The President "has always possessed the power to bring the country to war, if he so chose"; McDougal & Lans 614. "[P]residential hegemony over the shaping of foreign policies . . . lead to the need to use armed forces"; Reveley, supra, n. 4 at 1304.

[6] Corwin, *President* 274, refers to the "ability of the President simply by his day-to-day conduct of our foreign relations to create situations from which escape except by the route of war is difficult or impossible." The President may "so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war"; John N. Pomeroy, *An Introduction to the Constitutional Law of the United States* §672 (Cambridge, Mass., 1875). See also Reveley, supra, n. 4 at 1245–1247. Cf. text accompanying n. 2 supra. The President "may conduct a vital phase of foreign policy literally for years without Congressional control, as with our foreign policy toward Japan before the last war, toward Russia during the war, and toward China after the war." Such policymaking "may lead to policies for which there is inadequate support, as with Wilson and, had not Pearl Harbor intervened, conceivably with Roosevelt." Robert A. Dahl, *Congress and Foreign Policy* 173 (New York, 1950).

[7] As Hugh Gaitskill, leader of the British Labour Party, said in 1960, "foreign affairs concern the lives and destinies of all of us today"; quoted in P. G. Richards, *Parliament and Foreign Affairs* 72 (London, 1967). In England "it has been abundantly clear to the majority of voters that their well-being and their very existence depends far more upon international developments than on domestic political issues"; ibid. 31.

[8] "The conclusion is unavoidable, for example, that in the years preceding Pearl Harbor, President Roosevelt and his advisers believed that many of their foreign policies could not have secured the support of a majority in Congress. Important foreign policies were made without prior or subsequent congressional consent"; Dahl, supra, n. 6 at 178. Dahl adds: "President and State Department believed they had information, experience, and a grasp of issues involved that the Congress and electorate lacked"; ibid. 180.

Because of the widespread ramifications of foreign relations, discussion must perforce be confined to two vital aspects: presidential executive agreements, and whether the Senate may be excluded from knowledge of, and participation in, negotiations as a part of the treatymaking process.[13] Mention only can be made of the legislative shortcomings which have contributed to the all but total takeover of foreign relations by the President, of the need for procedural reform in the Senate if its participation is to be effective.[14] Could we view the matter as an original question, that is, were we drafting or amending a Constitution and free to decide where power is best vested, such factors might persuade that exclusive power over foreign affairs is best lodged in the President. Apart from countervailing considerations, however, if the Constitution provides for Senate participation in treatymaking, the Senate cannot now be barred on the ground that it lacks the wisdom and machinery to participate effectively.[15] "The peculiar circumstances of the moment," said Marshall, "may render a measure more or less wise, but cannot render it more or less constitutional."[16] Accordingly, the focus of discussion will be the constitutionality of presidential monopoly claims. The starting place of course must be the constitutional text itself, in the light of such illumination as is provided by the intention of the Framers and the understanding of the Ratifiers.

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[9] See n. 123 infra.

[10] Judge Learned Hand asked, "is it not possible to argue that Congress, especially now that the appropriations for the Armed Forces are the largest items of the budget, should be allowed to inquire in as much detail as it wishes, not only how past appropriations have in fact been spent, but in general about the conduct of the national defense?" L. Hand, *The Bill of Rights* 17–18 (Cambridge, Mass., 1958). Hand's tentative question, framed in terms of "should be allowed to inquire," can be firmly answered in light of the plenary parliamentary control over the expenditure of appropriations (supra, Ch. 4, text accompanying nn. 272–274), early congressional insistence that appropriations be applied solely to the objects specified (ibid. at n. 277), and the established parliamentary inquiries into the conduct of war (supra, Ch. 2, text accompanying nn. 15–23), and into the disbursement of public moneys; (ibid. at nn. 24–29).

[11] See Ervin Hearings 27. Senator J. W. Fulbright, Chairman of the Foreign Relations Committee, testified, "I have made repeated efforts to secure access to the 5-year plan for military assistance for use by the Foreign Relations Committee in its consideration of military assistance under the foreign aid authorization bill." In vain. Ibid.

[12] On June 19, 1972, the Senate voted to cut off funds for recently concluded military base agreements with Portugal and Bahrein unless the agreements were submitted to the Senate as treaties. The Executive did not comply with an earlier Senate resolution asking for submission of the executive agreements as treaties, on the ground that they had already been concluded; 118 Cong. Rec. S 9653 (daily ed. June 19, 1972); N.Y. Times, June 20, 1972 at 1, 15. Many millions of dollars were involved.

[13] Recall Wilson's 1908 remark that the President "need disclose no step in the negotiation until it is complete . . . [and then] the government is virtually committed"; supra, text accompanying n. 2. True, Congress may reject a treaty, but the shift in policy may have "disastrous consequences for the international structure of power"; Dahl, supra n. 6 at 97.

[14] For an excellent discussion of the entire problem, see Dahl, supra n. 6.

The constitutional provisions which confer power upon the President in the premises are three, only one of which is confided to the President alone: authority to receive ambassadors or ministers. This, Hamilton explained in *The Federalist*, is "more a matter of dignity than authority," "without consequence," in order to obviate the "necessity of convening the legislature . . . upon every arrival of a foreign minister"[17]—a slender reed upon which to rest a claim of monopoly of foreign relations. The other two presidential powers—to appoint ambassadors and ministers and to "make" treaties—are conditioned upon the "advice and consent" of the Senate, which is thus intended to participate in these acts. In addition, Congress is given the exclusive power "to regulate commerce with foreign nations . . . to control naturalization,"[18] plus the power to lay duties and thereby control tariffs. Thus, commercial and tariff treaties were made primarily an object of congressional concern. "From the beginning," Professor Henkin states, "the foreign trade of the United States was near the core of its foreign policy and the power to regulate commerce with foreign nations gave Congress a major voice in it."[19] Looking to the aggregate of powers that affect foreign relations, it is safe to say with Professor Henkin that the "Constitution clearly gave Congress the ultimate foreign relations power, the power to go or not go to war, major legislative powers integral to foreign policy (for example, to regulate foreign commerce), and a spending power that has become a principal tool in foreign as in domestic affairs."[20]

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[15] For improvements in the congressional machinery, see ibid. 146–168. Many consider the presidential policy that involved us in the Vietnam war a monumental folly, among them General Charles de Gaulle. See infra, Conclusion, n. 5. Dahl states that "to the extent that the executive is capable of solving its problems without accepting Congressional collaboration, it must become more and more the democratic shadow" of a "frank dictatorship"; Dahl, supra, n. 6 at 264. See also ibid. 116.

[16] Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* 190–191 (Stanford, 1969).

[17] "The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient . . . than that there should be a necessity of convening the legislature . . . upon every arrival of a foreign minister"; Federalist No. 69 at 451. "Receiving ambassadors," observes Professor Henkin, "seems a function rather than a 'power,' a ceremony which in many countries is performed by a figurehead." And "While making treaties and appointing ambassadors are described as 'powers' of the President (Article II, sect. 2), receiving ambassadors is included in section 3 which does not speak in terms of power but lists things the President 'shall' or 'may' do"; Henkin 41.

[18] Arthur Schlesinger, Jr., "Congress and the Making of American Foreign Policy," 51 Foreign Affairs 78, 81–82 (1972). For the several provisions see U.S. Constitution, Art. I §8(1), (3), (4).

I. NEGOTIATION OF TREATIES

A. *The Text of the Constitution*

Article II, §2 of the Constitution provides that the President

> shall have power by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers . . .

Section 3 provides that "he shall receive Ambassadors and other public Ministers . . ." From these provisions Justice Sutherland distilled his oft-quoted statement that with respect to

> external affairs . . . participation in the exercise of the power is significantly limited. In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.[21]

Vainly does one search for "significant limits" in the constitutional text; they are of Sutherland's own contriving.

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[19] Henkin 69. Henkin also states, "The vast legislative powers of Congress that relate particularly to foreign affairs do not begin to exhaust its authority to make laws affecting foreign relations"; ibid. 76–78. Such comprehensive grants, to put it mildly, are repugnant to the claim that the Senate need not be consulted about foreign relations.

[20] Henkin 273. "The solid fact," stated Professor Ruhl J. Bartlett, "is that Congress is the authoritative organ of the government in the determination of foreign policy. The President is the agent of Congress, the spokesman of the United States in diplomatic relations"; Executive Agreements Hearings 19.

[21] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

As was so often the case, the Framers borrowed the words "advice and consent" from parliamentary practice. They were words of art, reaching deep into history, which were descriptive of *participation in lawmaking*. For example, the statute of 13 Charles II (1661) states: "be it enacted by the King's most excellent Majesty, by and with the Advice and Consent of the Lords and Commons in this present Parliament assembled."[22] When, therefore, those words were employed in the "treaty" phrase, they connoted full participation in the *making* of a treaty,[23] as the history of the treaty clause clearly demonstrates.

Before Justice Sutherland ascended to the bench, he explained: "It will be observed that the advice and consent of the Senate qualifies the power of the Senate to *make*, and not to *negotiate*, treaties."[24] Since no mention whatever of "negotiate" is to be found in the constitutional text, it could hardly be "qualified." What power to "negotiate" a treaty exists derives from the power to "make" a treaty; and since the "make" power is expressly subject to "advice and consent," it follows that the power to "negotiate" a treaty is likewise so qualified. Nor does history disclose an intention to separate the "negotiate" component for independent presidential exercise; to the contrary, as will appear, the Founders intended the Senate to participate in all stages of treatymaking. They knew well enough how to single out a particular function for independent presidential exercise, as when they provided that the President "shall *nominate*, and by and with the Advice and Consent of the Senate, shall *appoint* Ambassadors." The fact that they did not equally provide that "he shall *negotiate*, and by and with the Advice and Consent of the Senate, *make* treaties" speaks volumes against the Sutherland reading. The comparison was tellingly drawn by Senator Henry Cabot Lodge, himself no mean historian:

> The carefully phrased section gives the President absolute and unrestricted right to nominate, and the Senate can only advise and consent

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[22] 2 Stat. at Large 681 (ed. 1758). Professor Arthur Bestor called my attention to this correlation.

[23] An early version, 3 Hen. V, 1 Stat. at Large 466 (1415), states: "Our Lord the King, at his Parliament . . . by the Advice and Assent of the Lords Spiritual and Temporal, and at the Request of the Commons . . . hath ordained and established divers Statutes and Ordinances." In the early medieval Parliaments the Commons were merely petitioners, not participants in lawmaking. Berger, *Impeachment* 20–21. When they became participants, they took part in the "advice and consent."

[24] George Sutherland, *Constitutional Power and World Affairs* 122 (New York, 1919).

to the appointment of a given person. All right to interfere in the remotest degree with the power of nomination and the consequent power of selection is wholly taken from the Senate. Very different is the wording of the treaty clause. There the words "by and with the advice and consent of" come in after the words "shall have power" and before the power referred to is defined. The "advice and consent of the Senate" are therefore coextensive with the "power" conferred on the President, which is "to make treaties," and apply to the entire process of treaty-making.[25]

As Lodge's analysis indicates, the textual terms are to be scrutinized with greatest care, the more so because the Framers were fastidious draftsmen. What Chief Justice Taney discerned on the face of the Constitution is richly attested by the Convention records: "No word was unnecessarily used, or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."[26]

What does the word "advice" connote? As early as 1806, Senator Anderson pointed out that the "advice should precede the making of the treaty," that the word was employed "for the purpose of obtaining the opinion of the Senate as to the principles upon which the treaty should be made."[27] In 1906 Senator Augustus Bacon developed this analysis: "We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating, and before they have determined, and before they have acted."[28] Unless "advice" is so understood, it is superfluous; it would have sufficed to require only Senate "consent" for the "making" of a treaty. So the process was understood by President Washington.[29]

In 1917 Edward S. Corwin countered with the argument that

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25. Quoted in Ralston Hayden, *The Senate and Treaties: 1789–1817*, at 17 (New York, 1920). The differentiation emerges even more clearly in an earlier version: "to have with the advice and approbation of the Senate the power of making all treaties . . . to have the nomination . . . subject to the approbation or rejection of the Senate"; 1 Farrand 292. In 1908 Woodrow Wilson considered that such consultation was required by the "spirit of the Constitution"; supra, n. 3.

26. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571 (1840).

27. Quoted in Hayden, supra, n. 25 at 202 n. 1.

28. 40 Cong. Rec. 2126. In 1971 Secretary of State Rogers testified that "in the formulation of policy, we feel we should consult and take into consideration and act upon congressional views." "Certainly," he stated, "in the foreign policy field the Congress plays a major role"; Fulbright Hearings 519. Cf. ibid. 530–531. One who has watched the conduct of foreign affairs by the Nixon administration must conclude that there is a wide gap between words and deeds, as we shall find equally in the field of "executive privilege."

29. See infra, text accompanying nn. 66–73; see also infra, text accompanying n. 110, for remarks of Rufus King, who had been a Framer.

"in connection with *appointments* the Senate's function of '*advice and consent*' is discharged by a mere 'yes' and 'no.'" "Advice" does not come too late when it surfaces after a "nomination," for the nomination has in nowise committed the President or the nation.[30] But to be effective, "advice" respecting "making" of a treaty must come before the positions of the negotiating parties have crystallized. In any event, Corwin leaves unanswered why "nomination" was freed of "advice and consent" whereas "treaty-making" was not. He himself later stated that "the Constitutional clause evidently assumes that the President and the Senate will be associated throughout the entire process of making a treaty."[31]

B. *The Understanding of the Founders*

Few are the instances in which deductions from the text are so unmistakably confirmed by the meaning attached to the terms by the Founders themselves. But first a quick recapitulation of the English antecedents earlier set forth so that the reader may view the constitutional provisions against the English background to which the Framers were throughout alive.[32]

As early as December 9, 1621 the House of Commons in a petition to James I stated with respect to matters of peace and war, "we cannot conceive that . . . the state of your kingdom, are matters at any time unfit for our deepest consideration in time of Parliament."[33] It needs constantly to be borne in mind that the Founders were more influenced by the struggle of the Commons in the revolutionary seventeenth century than by subsequent eighteenth-century developments.[34] Parliament, through its power over supplies, constrained James I "to make no treaty without first acquainting parliament and requesting its advice."[35] When "the long parliament was sitting the king informed the members of the alliance he was about to make with the Dutch, and asked for advice."[36] After the Restoration the Commons again "insisted on a share in foreign policy if they were to supply the means of carrying it out"; and the Crown acquiesced. The Lord Chancellor declared in 1763 that "the King . . . hath made your Counsels the Foundation of all His Proceedings" abroad.[38] When negotiations respecting the second partition treaty (1700) were "carried through without the advice of parliament" it impeached those who assisted William in making it.[39] The "participation of parliament in foreign affairs and even its supervision of them was . . . fully recognized" in the Hanoverian period.[40] Christopher Hill concluded that by 1714 "Parliament had established a degree of control over the executive and over all its actions—including foreign policy."[41]

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[30] Edward S. Corwin, *The President's Control of Foreign Relations* 183 n. (Princeton, 1917) (hereafter cited as Corwin, *Control*). The distinction was appreciated in the antecedent provision; supra, n. 25.

[31] Corwin, supra, n. 1 at 412. Corwin stated that the "significant thing" about the phraseology of the treaty-clause "is that it associates the President with the Senate *throughout the entire process* of treaty-making"; Corwin, *President* 253. McDougal & Lans 553 state: "The Framers assumed . . . that the Senate would participate equally with the President in the active direction of all negotiations and all aspects of foreign policy." See also ibid. 220; see Henkin 131. Compare with the foregoing history Dean Acheson's assertion that "the negotiation of [a treaty] is given to one branch and ratification to another"; Ervin Hearings 264. He considered that the Senate was limited to "exercising its constitutional power to make a treaty by ratifying it"; ibid. 261. Certainly nothing in the text requires the conclusion that the President may *exclude* the Senate from full participation in treatymaking.

[32] See supra, Ch. 4, n. 275; Berger, *Impeachment* 87 n. 160, 143 nn. 97, 197, 217–218. Cf. ibid. 4, 30 nn. 107, 89, 98, 99, 101, 122, 171 n. 217. See also infra, n. 47.

[33] Joseph R. Tanner, *Constitutional Documents of the Reign of James I, 1603–1625* at 281 (Cambridge, 1960).

All this was part of the struggle between Parliament and the Crown, which eventuated in parliamentary supremacy.[42] Thereafter came ministerial responsibility to Parliament rather than to the King, and management of foreign affairs by Ministers who, under orthodox theory, were under the control of Parliament. What such control could mean is illustrated by a resolution passed by the House of Commons in 1782—not without relevance to President Nixon's disregard of the repeal of the Gulf of Tonkin Resolution[43]—condemning the "farther prosecution" of the war with the American colonies on the ground that it was the means of "weakening the efforts of this country against her European enemies" and increasing the "mutual enmity, so fatal to the interests both of Great Britain and America."[44] When the ministry disregarded this resolution, a second resolution declared that "this House will consider as enemies" those who advise the "further prosecution" of the war "for the purpose of reducing the revolted Colonies to obedience by force." Now Lord North yielded and bowed to the opinion of Parliament.[45] The Founders, who cited the ongoing impeachment of Warren Hastings,[46] were hardly unfamiliar with these pages of Hansard.[47]

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[34] See supra, Ch. 2, n. 39; and infra, n. 47.

[35] E. B. Turner, "Parliamentary Government and Foreign Affairs, 1603–1760," 38 Eng. Hist. Rev. 172, 174 (1919).

[36] Ibid. 175.

[37] Ibid. 175.

[38] Ibid. 177. "Since Danby's fall [ca. 1678] sprang from the government's foreign policy, the Commons' effective control of this hitherto sacrosanct sphere was again demonstrated." Christopher Hill, *The Century of Revolution, 1603–1714,* p. 230 (New York, 1961). In 1701 the Commons advised the King to act in concert with the States General in treaty negotiations with France to "conduce to their security"; the King responded that he had done so; 5 Parl. Hist. Eng. 1243 (1701). The King communicated the posture of the negotiations, and in closing said that the "safety of England . . . does very much depend upon your Resolutions in this matter"; ibid. 1250. In 1709 both Houses advised Queen Anne as to measures for a secure peace; 6 Parl. Hist. Eng. 788.

[39] Turner, supra, n. 35 at 183. In 1715 the Commons "impeached Oxford because . . . he had misrepresented negotiations to the queen and hence to parliament," and so "prevented the just Advice of the Parliament to her Majesty"; ibid. 188. Was it sheer coincidence that James Iredell told the North Carolina Ratification Convention that if the President "has concealed important intelligence" from the Senate and so induced them to consent to a treaty, he could be impeached?; 4 Elliot 127.

[40] Turner, supra n. 35 at 188.

[41] C. Hill, supra n. 38 at 2. Parliament had emerged "as the leading partner"; Trevelyan 472.

[42] Clayton Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge, 1966).

When the revolting colonies assembled in the Continental Congress and dispensed with an executive, they carried the movement for parliamentary supremacy to its logical conclusion. Experience led them to make an exception for a Secretary of Foreign Affairs, and John Jay was appointed to the post.[48] But he was kept under a tight rein, as the Journals of the Congress disclose. There could be no secrets from Congress: "Any member of Congress shall have access" to the Secretary's books and records, read the resolution.[49] And the Congress more than once appointed a Committee to investigate the Department of Foreign Affairs.[50]

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43. Supra, Ch. 4, text accompanying nn. 136–138.

44. 22 Parl. Hist. Eng. 1071, 1085 (1781–1782).

45. Ibid. 1089, 1090, 1107.

46. E.g., George Mason, 2 Farrand 550; John Vining, 1 Annals of Cong. 373 (1789).

47. Hamilton's statement in Federalist No. 69 at 450–451, suggests unfamiliarity with the particulars: "The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce." But, he emphasized, "In this respect . . . there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature."

But compare Gouverneur Morris' reminder that in England "the real King [is] the Minister"; 2 Farrand 104. Cf. ibid. 69. Note too the Founders' familiarity with the details of English impeachment practices. Berger, *Impeachment* 54–55, 74–75, 84–85, 88–89. *See also* supra, Ch. 2, n. 162.

48. 19 Jour. Contl. Cong. 43 (1781); 20 Jour. Contl. Cong. 638 (1781).

49. 22 Jour Contl. Cong. 88 (1782).

50. Ibid. 370; 24 ibid. 37 n.

To argue that all this was changed by the constitutional provision for an executive branch and the separation of powers is to lose sight of the development of the treaty clause. The Framers—thirty of the fifty-five had been members of the Continental Congress—[51] began by adopting its practice. As late as August 6, the Convention Committee on Detail draft provided that "the Senate . . . shall have power to make treaties."[52] During the debate Madison "observed that the Senate represented the States alone," and, consequently, "the President should be an agent [not the exclusive agent] in Treaties."[53] As the Convention drew to a close, the Committee of Eleven proposed on September 4 that "the President by and with the advice and Consent of the Senate, shall have power to make Treaties."[54] How this appeared to the Framers may be judged from Rufus King's remark that "as the Executive was here joined in the business, there was a check [on the Senate] which did not exist in [the Continental] Congress."[55] It was the President, therefore, who was finally made a participant in the treatymaking process, which had been initially lodged—after the pattern of the Continental Congress—in the Senate alone. Not the slightest hint is to be found in the Convention records that thereby the President was meant to nose out the Senate from participation in any part of treatymaking. To the contrary, Hamilton explained in Federalist No. 75 that

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[51] The dual members were Abraham Baldwin, George Clymer, John Dickinson, Thomas Fitzsimons, Benjamin Franklin, Elbridge Gerry, Nicholas Gilman, Nathaniel Gorham, Bedford Gunning, Alexander Hamilton, Jared Ingersoll, Daniel of St. Thomas Jenifer, William S. Johnson, Rufus King, John Langdon, James Madison, James McHenry, Thomas Mifflin, Gouverneur Morris, Robert Morris, William Pierce, Charles Pinckney, Edmund Randolph, George Read, John Rutledge, Roger Sherman, Richard O. Spaight, George Washington, Hugh Williamson, and James Wilson.

The New Jersey Plan proposed to vest in Congress certain powers, "in addition to the powers vested in the United States in Congress, by the present existing articles of Confederation." 1 Farrand 243. In the New York Ratification Convention, Chancellor R. R. Livingston explained that the Continental Congress "have the very same" powers proposed for the new Congress, including the power "of *making* war and *peace* . . . they may involve us in a war at their pleasure"; 2 Elliot 278; emphasis added.

[52] 2 Farrand 183.

[53] Ibid. 392.

[54] Ibid. 498.

[55] Ibid. 540. "Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in those powers"; Corwin, supra, n. 1 at 412. Commenting on the concurrence of the two branches to make a treaty, Patrick Henry stated, "the President, as distinguished from the Senate, is nothing"; 3 Elliot 353.

> the vast importance of the trust, and the operation of treaties as laws, plead strongly for the *participation* of the whole or a portion of the legislative body in the office *of making* them . . . It must indeed be clear to a demonstration that the *joint possession* of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them.[56]

The same point had earlier been made by John Jay in *The Federalist*, and though he appreciated that negotiations with those who preferred to "rely on the secrecy of the President" might arise, he stressed that such secrecy was with respect to "those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiations." The President, "in forming [treaties must] act by the advice and consent of the Senate."[57] Corwin correctly reads Jay to mean that "occasions" may arise . . . when the *initiation* of a negotiation may require great secrecy and dispatch, and at such times the President must undoubtedly *start the ball rolling;* but otherwise all negotiations of treaties will be the joint concern of President and Senate."[58]

The Ratification Conventions were given to understand that the Senate, without qualification, was to participate in the *making* of treaties. Some cumulative detail may be pardoned because of the importance of this point. In New York, Chancellor R. R. Livingston stated that the Senate "are to form treaties with foreign nations"; and Hamilton explained that "They, together with the President, are to manage all our concerns with foreign nations." Chancellor Livingston repeated that "the Senate was to transact all foreign business."[59] In Pennsylvania, James Wilson said, "nor is there any doubt but the Senate and the President possess the power of making" treaties; and that he was "not an advocate for secrecy in transactions relating to the public; not generally even *in forming* treaties."[60] What should not be withheld from the *public* could not be withheld from the co-partner in treatymaking. In North Carolina, Samuel Spencer stated that the Senate "are, in effect to form treaties."[61] And speaking to "intercourse with foreign powers," James Iredell said that it is the President's "duty to impart to the Senate every material intelligence he receives." If he "has concealed important intelligence . . . and by that means induced them [the Senate] to enter into measures . . . which they would not have consented to had the true state of things been disclosed to them," impeachment would lie.[62] With good reason, therefore, do even those commentators who construe the President's authority broadly agree that "the Senate was made a participant in his diplomatic powers."[63] Indeed, it would fly in the face of common sense to deduce that the Framers, after taking great precautions, as James Wilson said, to put it beyond the power of a "single man . . . to involve us in such distress [war],"[64] then unraveled all their labors by giving sole control of foreign policy, which can plunge a nation into war, to that very "single man."

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[56] Federalist No. 64 at 486, 488; emphasis added.

[57] Ibid. 419, 420.

[58] Corwin, *President* 253; emphasis added. That is the negative pregnant of Pierce Butler's explanation to the North Carolina Ratification Convention of why the House was not joined in treatymaking: "negotiation always required the greatest secrecy, which could not be expected in a large body"; 4 Elliot 263. A smaller body, i.e., the Senate, was therefore preferred for "negotiation." The need for secrecy was the stock explanation why the House was excluded from treatymaking. See, e.g., 2 Elliot 506, 3 Elliot 509, 4 Elliot 290.

[59] 2 Elliot 291, 305, 323.

[60] Ibid. 506; emphasis added.

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61. 4 Elliot 116. See the statement of William Davie, infra, text accompanying n. 152. In the course of a 1790 debate in the First Congress, Michael Stone stated in the House that "the principles of the Constitution" vest "the Senate equally with the President, in the whole business of negotiation"; 1 Annals of Cong. 1085. And, he stated, "If you give an influence to the President superior to the Senate, in anything relating to the intercourse between the United States and foreign nations, you deviate from the principles of the Constitution"; ibid. 1082. Roger Sherman, a Framer, added that "the two bodies ought to act jointly in every transaction which respects the business of negotiation with foreign powers"; ibid. 1085.

62. 4 Elliot 127. William Davie, a Framer, explained to the North Carolina Convention "that jealousy of executive power which has shown itself so strongly in all the American governments, would not admit" of lodging the treaty power in the President alone. And because of "the extreme jealousy of the little states" it became "necessary to give them an absolute equality in making treaties"; ibid. 120. In other words, Senate participation in treatymaking was demanded in order to satisfy small state jealousy. C. C. Pinckney's remark in South Carolina that the Senate was given "the power of agreeing or disagreeing to the terms proposed" by the President, ibid. 265, is opposed to the decided consensus that treaty *making* was a joint function.

63. Corwin, *President* 366, 254. McDougal & Lans, 539 n. 25, state: "The testimony of delegates to the Constitutional Convention clearly indicates the intention of the draftsmen that the Senate participate equally with the President in the step-by-step negotiation of treaties." See also ibid. 207, 220.

Looking at "the constitutional landscape," Corwin concluded that "the legislative power, was evidently intended originally to be the predominant one"; Corwin, *Total War* 158. Recall Madison's "In republican government, the legislative authority necessarily predominates"; Federalist No. 51 at 338.

64. 2 Elliot 528. That acute student of constitutional government, Walter Bagehot, said that the Framers "shrank from placing sovereign power anywhere. They feared it would generate tyranny"; W. Bagehot, *The English Constitution* 218 (London, 1964); see also supra, Ch. 3, n. 8. It is virtually beyond debate that the intention of the Framers was to confer all power connected with warmaking on Congress, leaving to the President only command of the armed forces and authority to repel sudden attack. See Ch. 4, supra, text accompanying nn. 7–45.

C. *Washington's Contemporaneous Construction*

Were the meaning of the constitutional text and the understanding of the Framers and Ratifiers, doubtful, we have the best of contemporaneous constructions[65]—by the presiding officer of the Convention, George Washington, our first President. In August 1789 he advised a Senate Committee that

> [i]n all matters respecting Treaties, oral communications [to the Senate] seem indispensably necessary; because in these a variety of matters are contained, all of which not only require consideration, but some of them may undergo much discussion; to do which by written communications would be tedious without being satisfactory.[66]

Oral communications proved impracticable; but Washington "continued to seek its [the Senate's] advice by message before opening negotiations" and "during their course."[67]

The facts have been beclouded by Corwin, who stated in 1917: "At the outset Washington sought to associate the Senate with himself in the negotiation of treaties, but this method of proceeding went badly and was presently abandoned."[68] So too, McDougal and Lans stated in 1945:

> it is clear the Framers anticipated that the Senate would normally function as an executive council, advising the President or his subordinates during the course of negotiations, as had been the case under the Articles of Confederation. This proposal for continuous consultation or for any significant degree of advance consultation proved to be unworkable and was abandoned during the administration of George Washington.[69]

All that "proved to be unworkable," however, was *oral* consultation with the Senate, and this because such was the awe in which

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[65] Respect for contemporaneous construction is deeply rooted in the past. In 1454 Chief Justice Prisot stated, "the Judges who gave these decisions in ancient times were nearer to the making of the statute than we now are, and had more acquaintance with it"; Windham v. Felbridge, Y. B. 33 Hen. 4, f. 38, 41 pl. 17, quoted in C. K. Allen, *Law in the Making* 193, 6th ed. (Oxford, 1958). For early American statements to the same effect, see Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827).

[66] 33 George Washington, *Writings* 373 (Washington, 1939).

[67] S. B. Crandall, *Treaties, Their Making and Enforcement* 68, 2d ed. (Washington, 1916); Denna F. Fleming, *The Treaty Veto of the American Senate* 21 (New York, 1930): Washington "adhered to the practice of asking the advice of the Senate before negotiations were opened and during their course."

[68] Corwin, *Control*, supra, n. 30 at 85.

[69] McDougal & Lans 207.

Washington was held that the Senate felt inhibited from necessary debate by his presence.

In Washington's own view, treaties called for the independent legislative judgment of the Senate. "In treaties," he wrote, the agency of the Senate "is perhaps as much of a legislative nature, and the business may possibly be referred to their deliberations in their legislative chamber.[70] For details of Washington's first and last visits to the Senate, we are indebted to the Journal of Senator William Maclay. Washington told the Senate that "he had called on us for our advice and consent to some propositions respecting the treaty to be held with the southern Indians."[71] Those propositions were stated under seven heads in a paper handed over by Washington. Maclay spoke up: "The business is new to the Senate. It is of importance. It is our duty to inform ourselves, as well as possible, on the subject." Lee wanted to read a particular treaty: "The business labored with the Senate. There appeared an evident reluctance to proceed." Gunn then moved that a treaty with the Creeks be postponed until Monday; his motion was seconded. Maclay noted, "I saw no chance of a fair investigation of subjects while the President of the United States sat there, with his Secretary of War to support his opinions, and overawe the timid and neutral part of the Senate." The motion carried. Washington, Maclay records, was in a "violent fret." Nevertheless, he appeared again on Monday, and again, "shamefacedness, or I know not what, flowing from the presence of the President, kept everybody silent."[72] Oral communication, so uncomfortable to all concerned, was thereupon abandoned. But that Washington continued to seek advice from the Senate "before opening negotiations" is attested by a series of instances collected by Crandall and confirmed by others.[73]

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[70] 30 Washington, *Writings*, supra, n. 66 at 378.

[71] William Maclay, *Sketches of Debates in the First Senate of the United States, 1789–1791* at 122 (Harrisburg, 1880).

[72] Ibid., 123–126. See also Hayden, supra, n. 25 at 20–27. Washington himself realized that "it could be no pleasing thing . . . for the President, on the one hand to be present and hear the propriety of his nominations questioned, nor for the Senate, on the other hand, to be under the smallest restraint from his presence from the fullest and freest inquiry into the character of the person nominated"; 30 Washington, *Writings*, supra, n. 66 at 374. That his presence would exercise a similar "restraint" on the Senate's "inquiry" into a *treaty* needs no argument. Henkin 375 fairly sums up that Washington "came seeking immediate yes-or-no answers to several questions about an Indian Treaty; the Senate insisted on a few days to refer it to a Committee and deliberate about it, not in the President's presence."

[73] Crandall, supra, n. 67 at 68–69; Hayden, supra, n. 25 at 27–28, 32–34, 40, 47, 51–52, 54–55; Forrest R. Black, "The United States Senate and the Treaty Power,"

To demonstrate "the right of the President to refuse the Senate information with respect to a pending negotiation," Corwin alleges that "this ground was first asserted by Washington against a call by the House of Representatives for information with respect to the negotiation of the Jay Treaty of 1794."[74] This citation is passing strange, for "in fact, all the papers affecting the negotiations . . . were laid before the Senate."[75] The denial to the House was based on Washington's view that the treaty power was vested exclusively in the President and Senate, so that there was no "right in the House of Representatives to demand . . . all the papers respecting a negotiation with a foreign power." Denial of the information to the House because it had no "right" to it, accompanied by delivery to the Senate which had such a "right," constituted recognition of the Senate's right and is poles apart from a precedent for refusal to the Senate. Indeed, Washington emphasized that he had no disposition to "withhold any information . . . which could be required of him . . . as a right," instancing a proposal to impeach by the House,[76] which, parenthetically, recognizes that inquiry is a corollary of impeachment. How scholars can fashion from such unpromising material a right to refuse information to the Senate respecting pending negotiations passes understanding.

A second point later made by Corwin stands no better. For his statement that "the relations of President and Senate in the realm of diplomacy came rapidly to assume a close approach to their present form," he relies on the Jay Treaty as "a prime illustration" of a treaty negotiated "under instructions in the framing of which the Senate had no hand."[77] At this time, the Federalists were in control of the Senate, and four of them—Oliver Ellsworth, George Cabot, Caleb Strong, and Rufus King—"were the backbone of the administration party in the Senate," and "dominated the entire proceeding." They suggested both the mission and the plenipotentiary to Washington, and then pressed Chief Justice John Jay to accept the post.[78] In effect, the Senate acted "through a small number of its members in whom both the executive and a majority of

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4 Rocky Mt. L. Rev. 1, 6 (1931). See also supra, n. 67. The practice, however, was not invariable. Hayden, supra, at 37.

[74] Corwin, *Control*, supra, n. 30 at 90.

[75] 5 Annals of Cong. 760 (1796).

[76] Ibid. 760–761. For discussion of the incident, see Berger, Executive Privilege 1085–1086.

[77] Corwin, *President* 257.

[78] Hayden, supra, n. 25 at 63, 65, 67, 92.

their colleagues had great confidence." In instructing the envoy, "the Senatorial group still exercised a powerful if not a predominant influence."[79] As Hayden observed: "The entire procedure, certainly, is very similar to that by which it later became customary to consult the Senate through the Committee on Foreign Relations before any important negotiation was embarked upon."[80]

D. *Marshall's "Sole Organ" of Foreign Relations*

One of the pillars of the claimed presidential monopoly of foreign relations is John Marshall's famed statement in 1799 that "[t]he President is the sole organ of the nation in its external relations."[81] Upon this statement Justice Sutherland uncritically relied in *United States v. Curtiss-Wright Export Corporation*,[82] and it was later cited by Justice Douglas in *United States v. Pink*.[83] Thus emboldened by "that arch constitutional conservative"[84]—Justice Sutherland—McDougal and Lans concluded that Marshall "indicated the constitutional basis for the consummation of direct Presidential [executive] agreements,"[85] from which the Senate was excluded. So it is that uncritical repetition of a statement torn from its context has raised it to the level of dogma.

Marshall spoke in the House of Representatives to the extradition of one Jonathan Robbins, charged with murder by Great Britain and surrendered to the British authorities without judicial hearing upon the order of President John Adams, who acted under an existing treaty.[86] Adams was under attack on the ground that the matter of surrender was for the courts, not the President. Patently, the participation of the Senate in treaty negotiations or in any other facet of foreign affairs was not remotely involved. The Robbins affair, replied Marshall, involved "a national demand made upon the nation" and was therefore

> not a case for judicial cognizance . . . The President is the sole organ of the nation in its external relations, and its sole representative with

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[79] Ibid. 71, 72; cf. ibid. 92.

[80] Ibid. 73.

[81] 10 Annals of Cong. 613 (1800).

[82] 299 U.S. 304, 319 (1936).

[83] 315 U.S. 203, 229 (1942). More recently, Justice Harlan, after citing Marshall's statement, stated that "there has been no substantial challenge to this description of the scope of executive power"; New York Times v. United States, 403 U.S. 718, 756 (1971), dissenting.

[84] McDougal & Lans 255.

[85] Ibid. 249–250.

[86] Corwin, *Control*, supra, n. 68 at 99.

> foreign nations. Of consequence, the *demand* of a foreign nation *can only be made on him*. . . .
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty. . . .
>
> Ought not [the President] to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, *may prescribe* the *mode*, and Congress *may devolve on others the whole execution* of the contract; but, till this be done, it seems the duty of the Executive department, to execute the contract by any means it possesses.[87]

Corwin justly concluded, "Clearly, what Marshall had foremost in mind was simply the President's role *as instrument of communication* with other governments."[88] Stripped of later interpretive encrustations, Marshall merely affirmed that a demand for extradition under a treaty "can only be made upon" the President; and that he is free to fashion his own means of complying with the treaty and demand until Congress "prescribes the mode." Far from excluding Congress from this "sole organ" area, therefore,

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[87] 10 Annals of Cong. 613–614; emphasis added. In his influential *President's Control of Foreign Relations*, Corwin stated that the "President is the organ of diplomatic intercourse . . . first, because of his power in connection with the reception and dispatch of diplomatic agents and with treaty making; secondly, because of the tradition of executive power adherent to his office." Corwin, *Control*, supra, n. 30 at 33. It follows, he stated, that "this power is preseumptively his alone," ibid. 35, and from this he glided into the "necessity of preserving to the President his full constitutional discretion in the conduct of our foreign relations"; ibid. 37. But the power to "receive" ambassadors, Hamilton explained, was "without consequence," "more a matter of dignity than authority." See supra, n. 17. By Corwin's own testimony, the treaty-power requires Senate participation in negotiations. Supra, n. 31 and text accompanying n. 58. No "tradition of executive power" can diminish the constitutional provisions nor defeat the intention of the Founders.

Corwin, *Control*, supra, n. 30 at 39, likewise relied on a Marshall dictum in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–166 (1803) to bolster the "discretion" of the President "as the organ of communication." Marshall pointed to the Act of Congress for establishing the department of foreign affairs, and said of the Secretary, "This office, as his *duties were prescribed by that act*, is to conform precisely to the will of the President"; emphasis added. It was the President's statutory control of the Secretary in the frame of judicial review that was under discussion, not his total freedom from congressional control. Congress could of course repeal the act; it could not permanently abdicate the powers confided to it, as Corwin himself noted. Corwin, *President* 9. And as we noted, Marshall recognized the overriding power of Congress even with respect to the President's sole power of communication.

[88] Corwin, *President* 216, Earlier, Corwin took exception to Marshall's assertion that "Congress may unquestionably prescribe the mode," etc.; Corwin, supra, n. 68 at 102. But if Marshall's statement is to undergird presidential claims, it must be read entire, limited as Marshall confined it. Corwin recognizes that by Act of Congress "complaints for extradition may be lodged with any court of record," but maintains that "the final act of surrender still rests with the discretion of the President"; Corwin, supra, n. 68 at 103. That exclusive enclave is small indeed.

Marshall regarded the exercise of even this power as subject to Congressional control.

E. *Hamilton's Later Views*

Corwin attributes the expansion of the "President's external role . . . in the first instance" to Hamilton, through the medium of his "Pacificus" papers in 1793.[89] Madison entered the lists under the nom de plume "Helvidius"; and John Quincy Adams remarked in 1836 that Madison "scrutinized the doctrines of Pacificus with an acuteness of intellect never perhaps surpassed," and that his "most forcible arguments are pointed with quotations from the papers of *The Federalist* written by Mr. Hamilton."[90] But "history," said Corwin, "has awarded the palm of victory to 'Pacificus,' " meaning that "[b]y his reading of the 'executive power' clause 'Pacificus' gave the President constitutional warrant to go ahead and apply the advantages of his position in a field of power to which they are specially adapted.[91] That "Pacificus' " views were congenial to presidential expansionism is hardly deniable; but whether they afforded a "constitutional warrant" must turn on the validity of his arguments rather than their subsequent adoption by presidents whose purposes they served. For, as Lord Justice Denman stated, "the mere statement and re-statement of a doctrine . . . cannot make it law, unless it can be traced to some competent authority."[92] The magic of Hamilton's name must not obscure the fact that he had executed a *volte-face*, repudiating assurances he had made both in *The Federalist* and in the New York Ratification Convention to procure adoption of the Constitution.

To still objections to the exclusive presidential power to "receive Ambassadors"—the sole foreign affairs power confided to the President alone—Hamilton had earlier assured the people that it "is more a matter of dignity than of authority . . . without consequence."[93] Now, as "Pacificus," he transformed this innocuous

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[89] Corwin, *President* 217.

[90] Ibid. 219, 466 n. 34, quoting J. Q. Adams, Eulogy on James Madison 46 (1836).

[91] Corwin, *Total War* 12.

[92] O'Connell v. Regina, 8 E.R. 1061, 1143 (1844). Maitland too stated that "some statement about the 13th century does not become true because it has been constantly repeated, that a 'chain of testimony' is never stronger than its first link"; Quoted in C. H. S. Fifoot, *Frederic William Maitland: A Life* 11 (Cambridge, Mass., 1971).

[93] See supra, n. 17.

"dignity" into "the right of the executive to decide upon the obligations of the country with regard to foreign nations," so that had there been an "*offensive* and defensive" treaty with France, presidential recognition "of the new government . . . would have laid the Legislature under an obligation . . . of exercising its power of declaring war."[94] The "story as a whole," Corwin observes, "only emphasizes the essential truth of 'Helvidius' ' contention that 'Pacificus' ' reading of the executive power clause contravened, certainly in effect, the express intention of the Constitution that the war-declaring power [plus discretion when to exercise it] should lodge with the legislative authority."[95]

Hamilton also built upon the contrast between Article I, which provides that "all legislative powers herein granted shall be vested in a Congress," and Article II, which declares that "the Executive power shall be vested in a President," brushing aside the enumeration of specific presidential powers that followed as not "derogating from the more comprehensive grant in the general clause."[96] Although the vast bulk of the powers granted by the Constitution are conferred upon Congress, it is the President, according to "Pacificus," who emerges with all but unlimited power. His view, as we have seen, is refuted by the historical record and by his own explanations in *The Federalist.*[97]

These were not the only departures by "Pacificus" from Hamilton's prior representations. Having erected a plenary executive power, "Pacificus" proceeded to whittle down "participation of the Senate in the making of treaties, and the power of the legislature to declare war" because "as exceptions out of the general 'executive power' vested in the President, they are to be construed strictly."[98] Not only does this run counter to the last-minute joinder of the President as a participant in the treaty power, but Hamilton himself had stated in Federalist No. 75 that the treaty power

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[94] 4 Hamilton, *Works* 442. With good reason, therefore, did Madison say that the reception clause merely provided "for a particular mode of communication . . . for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title," so that "it would be highly improper to magnify the function into an important prerogative"; 6 Madison, *Writings* 162. "So visionary a prophet," Madison indicated, as would have foretold in 1788 that Hamilton would in 1793 elevate an admittedly inconsequential power to that of imposing on Congress an obligation to declare war, would not have been believed; ibid. 162–163.

[95] Corwin, *Total War* 14. See generally, supra, Ch. 4.

[96] 4 Hamilton, *Works* 438–439. "The Supreme Court," states Henkin, 43, "has not considered [the executive power clause] as a possible source of constitutional power to conduct foreign relations." See infra, text following n. 187.

[97] Supra, Ch. 3, text accompanying nn. 47–55.

[98] 4 Hamilton, *Works* 443.

"partake[s] more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either."[99] Wilson and Madison, far more influential in the Convention than Hamilton, stated that some of the King's prerogatives "were of a Legislative nature. Among others that of war & peace"; and consequently those prerogatives were not "a proper guide in defining the Executive powers." The "only powers," they considered "strictly Executive were those of executing the laws, and appointing officers not appointed . . . by the Legislature."[100] Later Wilson stated that in the distribution of war powers *all* of the powers "naturally connected" with Congress' power to "declare war" were confided to it, leaving to the President only "authority to lead the army."[101] If there was an "exception," it ran the other way, from the plenary warmaking power of Congress for the executive function of "first General." So too, the treaty power, which was lodged in the Senate almost to the end of the Convention, and only then altered to admit presidential participation, hardly reflects a view that it is executive in nature.[102]

After his "Pacificus" papers Hamilton returned to his earlier view, writing in his *Letters of Camillus* that "the organization of the power of treaty in the Constitution was attacked and defended with an admission on both sides, of its being of the [legislative] character which I have assigned to it. Its great extent and importance . . . the legislative authority were mutually taken for granted."[103]

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[99] Federalist No. 75 at 486.

[100] 1 Farrand 65–66, 70.

[101] 1 Wilson, *Works* 433, 440. For extended discussion, supra, Ch. 4.

[102] In his "Helvidius" letters, Madison reasons: "The natural province of the executive magistrate is to execute the laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of laws to be executed. A treaty is not the execution of laws: it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the *executive magistrate*. To say, that the power of making treaties, which are confessedly laws, belongs naturally to the department which is to execute it, is to say that the executive department naturally includes a legislative power. In theory this is an absurdity—in practice a tyranny"; 6 Madison, *Writings* 145. After serving as Secretary of State, Vice President Jefferson wrote in his *Manual of Parliamentary Practice* §52 that "Treaties are legislative acts."

Corwin considered that Madison's view is inconsistent with his position during the "removal" debate in 1789; Corwin, *Control*, supra, n. 30 at 28–29. If Madison's 1789 views were inconsistent with the views he later expressed, the latter were consistent with the 1788 statements that are an index to construction of the Constitution. See Berger, *Congress v. Court* 76–81.

Then too, the issues were entirely different. The Constitution made no provision for removal from office, and there was no explanation by the Framers. Hence, when Madison and others argued that the power ought to be in the Executive, they contradicted neither the express terms of the Constitution nor its history. Hamilton, however, did contradict the evident assumption writ large in the text that "the President and Senate will be associated throughout the making of a treaty"; see text accompanying n. 31 supra. And in his subsequent *Letters of Camillus*, Hamilton stated that because of the "most ample latitude" of the treaty power "it was so carefully guarded; the cooperation of . . . the Sente . . . being required to make any treaty whatever"; 6 Hamilton, *Works* 183.

Of course Hamilton was free to change *his* mind from time to time; but the meaning of the Constitution, as Jefferson stressed, is "to be found in the explanations of those who advocated it," upon which the people relied in adopting the Constitution.[104] Until the people are given the chance to say whether *they* have changed their minds, Hamilton's shifts can furnish no "constitutional warrant" for an unconfined executive power. It is the unmistakable lesson of history that the President was intentionally given a few enumerated powers, no more.

F. *The 1816 Senate Report*

Another hardy perennial frequently drawn forth in defense of presidential monopoly—by Justice Sutherland[105] and Dean Acheson[106] among others—is an 1816 Report by the Senate Committee on Foreign Relations, which counseled against "interference of the Senate in the direction of foreign negotiations."[107] This warning was based on notions of expediency, as to which men may differ, rather than upon the historical content of the treaty power. Opposed to this Committee Report is a Senate debate in 1806, which discloses that the *Senate* then "believed that, constitutionally, it possessed authority to participate in treaty-making at any stage in the process,"[108] a belief later shared by Secretary of State Buchanan and President Polk.[109]

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[103] 6 Hamilton, *Works*, 185. In this letter Hamilton cited the dissent of George Mason from the Constitution on the ground that "By declaring all treaties supreme laws of the land, the Executive and Senate have, *in many cases,* an *exclusive power of legislation*"; and he comments, "This shows the great extent of the power, in the conception of Mr. Mason: *in many cases* amounting to an *exclusive power of* legislation: nor did he object to the extent"; ibid. 184.

[104] Quoted in 4 Elliot 446. So too, Madison clung "to the sense in which the Constitution was accepted and ratified by the Nation . . . And if that be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers"; 9 Madison, *Writings* 191.

[105] United States v. Curtiss-Wright Export Corp., 299 U.S. at 319. See supra, text accompanying n. 21.

[106] Ervin Hearings 260. The Report was also cited by Assistant Attorney General Rehnquist, ibid. 431.

[107] "[T]he President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety"; quoted in 299 U.S. at 319, and in Ervin Hearings 260.

A more important episode is the statement in the Senate by Senator Rufus King in 1818. King had been a member of the Continental Congress, of the Federal Convention where, as a member of the Committee of Detail, he helped draft the final provision for presidential participation in treatymaking, of the Massachusetts Ratification Convention, and of the Senate quadrumvirate, which piloted the Jay Treaty from beginning to end. Said King,

> in respect to foreign affairs, the President has no exclusive binding power, except that of receiving Ambassadors . . . [T]o the validity of all other definitive proceedings in the management of the foreign affairs, the Constitutional advice and consent of the Senate are indispensable . . . [I]n this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs . . . they may, therefore, at any time call for full and exact information respecting the foreign affairs . . . To make a treaty includes all the proceedings by which it is made; and the advice and consent of the Senate being necessary in the making of treaties, must necessarily be so, touching the measures employed in making the same.[110]

King rejected the gloss "that the President shall make treaties, and by and with the consent of the Senate ratify the same."[111] Great weight attaches to his explanation, not merely because "he was there," but because it faithfully corresponds to the view that was taken of the treaty power by the Framers, *The Federalist*, the Ratifiers, and by President Washington.

Proponents of expanded presidential power over foreign relations also rely on the *Curtiss-Wright* dicta[112] and "adaptation by usage,"[113] issues earlier discussed in connection with the powers of the Commander-in-Chief and which require no special tie-in to foreign relations.

Here let me note only that for pages on end McDougal and Lans ring the changes on the evils of rule by a one-third Senate minority,[114] and in midstream call on Jefferson's statement in 1816 that

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[108] Hayden, supra, n. 25 at 203, 199–203.

[109] Quoted in Black, supra, n. 73 at 7–8.

[110] 31 Annals of Cong. 106–107 (1818).

[111] Compare supra, text accompanying note 21.

[112] Supra, Ch. 4 nn. 206, 216.

[113] Ibid. text accompanying and following n. 155.

[114] McDougal & Lans 536–582.

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched . . . Let us . . . avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils."[115]

But Jefferson, who had stated that "in questions of power then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution,"[116] who adhered to the "meaning" of the Constitution as "found in the explanations of those who advocated it" in the Ratification Conventions,[117] was hardly the man to embrace self-appointed revisers of the Constitution. Rather, he must be understood to mean that reverence should not preclude us, in the light of experience, from improving the Constitution in the manner it provides—by amendment.

II. EXECUTIVE AGREEMENTS

A. *Evolution*

Executive agreements are not mentioned in the Constitution, in the Constitutional Convention, in *The Federalist*, or in the Ratification conventions; indeed the term is of comparatively recent vintage.[118] Starting from a trickle,[119] executive agreements made by the President alone—which can involve large financial, and possibly military, commitments[120] and which have invaded the area of tariffs and foreign commerce that was made the exclusive province of Congress[121]—have since 1930 mounted to a flood.[122] Many of these agreements the State Department refused to reveal even to the Senate,[123] the constitutional participant in the making of international agreements. Professor Ruhl J. Bartlett reminded us of the Taft-Katsura agreement of 1905, whereby "President Theodore Roosevelt agreed to Japan's control over Korea," and which probably violated "the Korean-American Treaty of 1882."[124] Senate Subcommittee Chairman Stuart Symington had "no knowledge" of "agreements in 1960 with Ethiopia, in 1963 with Laos, in

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[115] Ibid. 545.

[116] Quoted in Charles Warren, *Congress, the Constitution, and the Supreme Court* 153 (Boston, 1925).

[117] Supra, Ch. 4, text accompanying n. 194.

[118] "Actually there are few documents which bear the title 'executive agreement' . . . But this phrase is used by the Department of State as the title of the series of publications listing important international agreements, negotiated subsequent to 1930, which did not receive Senatorial consent under Article II, Section 2, prior to ratification"; McDougal & Lans 198, n. 16.

[119] The power was appraised modestly enough in 1917 by Corwin, *Control*, supra, n. 30 at 125, when he referred to "the President's prerogative in the making of international compacts of a temporary nature and not demanding enforcement by the courts," and prophetically stated that it "is likely to become larger before it begins to shrink."

"Since 1933 there has been a considerable extension in the use of the executive agreement, and it has been employed for purposes never contemplated by statesmen or writers before 1930. This movement was accelerated since the *Curtiss-Wright* decision in 1937, avowing a wide inherent power of the Federal Government to deal with foreign affairs"; Edwin Borchard, "Treaties and Executive Agreements—A Reply," 54 Yale L.J. 616, 649 (1945).

[120] Consider, for example, the 435 million dollars in credits and assistance promised to Portugal in return for a 25-month extension of base rights in the Azores; N.Y. Times, April 3, 1972, p. 7. An editorial in the *Times* remarks, "the

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stationing of American troops abroad and the establishment of military bases . . . can commit the nation to war in some instances as thoroughly as a treaty of alliance"; N.Y. Times, May 1, 1972, p. 32. For secret promises by Admiral Carney to Greece of atomic support, and a secret agreement governing nonwithdrawal of combat troops stationed in Europe, see C. L. Sulzberger, *A Long Row of Candles* 867, 923 (New York, 1969).

[121] See supra, text accompanying n. 19. Writing in 1951, Senator Robert Taft stated: "More and more the State Department has assumed to do many things which are beyond its power in the field of trade . . . It has insisted that the Executive have the power to raise and lower tariffs, through reciprocal trade agreements within constantly widening limits . . . Political agreements as important as those made at Yalta have never been submitted to Congress at all"; Fulbright Hearings 262.

[122] "The office of the Legal Adviser of the Department of State reports 368 treaties and 5,590 other international agreements concluded by the United States between Jan. 1, 1946 and April 1, 1972"; Henkin 420, n. 1.

[123] Indeed, a civil servant, apparently a former officer of the State Department, suggested that "for controversial international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements." Wallace McClure, *International Executive Agreements* 378 (New York, 1941).

Professor Philip B. Kurland, Chief Consultant to the Senate Subcommittee on Separation of Powers, stated before that Committee in an exchange with former Secretary of State Dean Acheson that "this committee . . . attempted to secure from the State Department a list, not even the contents, but a list of executive agreements between this country and foreign countries and the State Department has been unwilling to afford that information to this committee. There are some hundred odd such agreements, the contents of which I think are unknown"; Ervin Hearings 268. See also the statement of Senator Sam J. Ervin, Jr., Washington Post, April 25, 1972 at A–7.

"In 1962 Secretary of State Rusk and the Thai Foreign Minister expressed in a joint declaration 'the firm intention of the United States to aid Thailand . . . in resisting Communist aggression and subversion . . .' While this statement may have been no more than a specification of SEATO obligations, the executive branch thereafter secretly built and used bases and consolidated the Thai commitment in ways that would still be unknown to Congress and the electorate had it not been for the indomitable curiosity of Senator Symington and his Subcommittee on Security Arrangements and Commitments Abroad"; Schlesinger, supra, n. 18 at 100–101. See supra, Ch. 1, n. 35.

Former Secretary of Defense Clark Clifford testified before the Senate that executive agreements lead "to excessive secrecy in policy-making, and it can lead to implied national commitments to other nations"; Washington Post, April 25, 1972, at A–7. Compare Madison's statement that "when a treaty is forming, secrecy is proper; but . . . when actually made, the public ought to be made acquainted with every circumstance relating to it"; 3 Elliot 331.

[124] Executive Agreements Hearings 21.

1964 with Thailand, in 1966 with Korea, in 1967 with Thailand, and secret annexes to the Spanish bases agreement of 1953."[125] To pile insult on injury, the State Department, Senator Fulbright, Chairman of the Foreign Relations Committee, stated, though "implored" to submit the agreement for bases in Spain as a treaty, declined. Instead, it submits "many agreements dealing with the most trivial matters as treaties"; but, Fulbright ironically told Secretary of State Rogers, "something that is as important as stationing troops and the payment of millions of dollars is proper for an executive agreement."[126] Even apologists for executive agreements agree that secret agreements are undesirable and that they should be subject to debate and the salutary influence of public opinion."[127]

Roused by this state of affairs, the Senate has recently moved to limit presidential circumvention of legislative prerogative by requiring that executive agreements be submitted for information; and it also has considered legislation that would confirm Senate power to veto executive agreements.[128] The vast bulk of executive agreements, 95 percent or more, the Legal Adviser of the State Department said, are tied into Senate or congressional authorization.[129] According to the State Department, they fall into several categories: (1) those made under the authority of a legislative act,

[125] Ibid. 69.

[126] Fulbright Hearings 529.

[127] In the course of vigorous advocacy of executive agreements, McDougal & Lans stated, "No one believes that secret agreements—except to the extent necessitated by war-time exigencies—are desirable . . . debate in the House of Representatives can only be an additional safeguard and provide public education of the highest value"; McDougal & Lans 552–553. "In any situation," they said, "reference of an important international agreement to Congress has the undoubted advantage of stimulating public discussion of the issues involved and permits the Executive's judgment to be questioned and checked by independent critics"; ibid. 555–556. Former Secretary of State Dean Acheson testified that "in most cases a legislative agreement would be better. You bring in the House and you have a much broader basis of support." He related that when he proposed that the UNRRA relief agreement should be an executive agreement, Senator Arthur Vandenberg exploded and "the State Department was scared off"; Ervin Hearings 268. As "a rule, international agreements, as well as treaties, should be entered into only in such a way that the salutary influence of public opinion can be brought to bear on them; the country should not, as a rule, be bound by stipulations of executive agreements without its knowledge and without opportunity to protest"; John Mathews, *American Foreign Relations: Conduct and Policies* 545–546 (New York, 1938).

[128] Pub. Law 92–403, 92d Cong. S. 596; 86 Stat. 619 (Aug. 22, 1972). See 118 Cong. Rec. S1904–1910 (daily ed. Feb. 6, 1972); N.Y. Times, May 1, 1972, p. 30. Senator Sam J. Ervin, Jr., introduced a bill that would authorize Congress to veto any executive agreement within sixty days of its transmittal; S. 3475, 92d Cong., 2d Sess. See 118 Cong. Rec. S5787–5788 (daily ed. April 11, 1972). For subsequent developments, see supra, n. 12.

[129] Executive Agreements Hearings 59.

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(2) those made prior to legislation but expressly made subject to later congressional approval or implementation, (3) those made pursuant to treaty, and (4) those which are derived directly from the President's constitutional powers.[130] The first three groups were sifted and categorized by the State Department,[131] and there exists no good reason why they should not be transmitted to Congress. The problems arise from the fourth category, those said to rest on the President's own constitutional powers.[132] It is therefore necessary to investigate the bases of the "independent" power claims, and to inquire whether resort to those "independent" powers represents an attempt to bypass the treatymaking provisions[133] and whether the proposed bill invades an area exclusively entrusted to the President.

Article II, §2 of the Constitution provides that the President "shall have power, by and with the Advice and Consent of the Senate, to make Treaties." At the adoption of the Constitution, the word "treaties" had a broad connotation; in the words of Nicholas Bailey's (1729) dictionary, a treaty was "an agreement between two or more distinct Nations concerning Peace, Commerce, Navigation, etc." Hamilton construed "treaty" in the broadest terms:

> from the *best opportunity of knowing the fact*, I aver, that it was understood by *all* to be the intent of the provision to give that power the most

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[130] Ibid. 16, 58. Edwin Borchard stated: "Circumstances have forced the Executive, in the conduct of military affairs and certain aspects of foreign relations, to conclude—either with or without congressional authorization—numerous agreements with foreign countries covering the movement of armed forces, the adjustment of claims, protocols, tariff and postal agreements, *modi vivendi* . . . even armistices." These agreements "have dealt either with routine questions, within the President's admitted constitutional powers, or have related to matters which the Senate deemed too unimportant for formal treaty procedure, or which Congress had previously authorized"; E. Borchard, "Shall the Executive Agreement Replace the Treaty?" 53 Yale L.J. 664, 670 (1944).

[131] Executive Agreements Hearings 72.

[132] Ibid. 16, 58. Cf. United States v. Pink, 315 U.S. 203, 229 (1942). As late as 1940, Green Hackworth, the respected Legal Adviser to the Department of State, stated that "International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties"; quoted Fulbright Hearings 12. And Attorney General Robert Jackson carefully emphasized that the agreement for exchange of British destroyers for bases "involve[d] no promises or undertakings by the United States that might raise the question of the propriety of incorporation in a treaty"; 39 Ops. Atty. Gen. 484, 488 (1940).

[133] A challenge to the constitutionality of an executive agreement which bypasses the Senate's role in treatymaking is made by Professor Henry Steele Commager and Richard B. Morris, Fulbright Hearings 23, 84, 102. "Congress," said former Justice Goldberg, must "act to correct departures from the spirit and letter of the Constitution"; ibid. 788. The important thing, he stated, is to restore "us to our constitutional safeguards"; ibid. 789.

ample latitude—to render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations . . . And it was emphatically for this reason that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever.[134]

Those indefatigable advocates of executive agreements, McDougal and Lans,[135] state that "there are no significant criteria, under the Constitution . . . or in the diplomatic practice of this government, by which the *genus* 'treaty' can be distinguished from the *genus* 'executive agreement,' other than the single criterion of the procedure or authority by which the United States' consent to ratification [by the Senate] is obtained."[136] It follows that the express provision for treatymaking by the Senate and President jointly—which embraces "all the stipulations . . . which national affairs might require . . . and every other species of convention"—covers the field.[137] Consequently, as Justice Jackson stated in the *Youngstown* case, where Congress had less clearly preempted the field, the presidential claim of power to make executive agreements is "clearly eliminated."[138] On the historical facts, the question, in the words of Professor Philip Kurland, is: "Should the Constitution really be read to mean that by calling an agreement an executive agreement rather than a treaty, the obligation to secure Senate approval is dissolved?"[139] Inescapably, the answer, to borrow from the Legal Adviser himself, is that, "if certain subject matters have to be dealt with by treaty, there is no option in the Executive to deal with those by executive agreements."[140]

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[134] *Letters of Camillus*, 6 Hamilton, *Works* 183. Compare Story's restatement: "The power 'to make treaties' . . . embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other"; 2 Joseph Story, *Commentaries on the Constitution of the United States* §1508 (Boston, 1905). The Hamilton-Story view is reflected in Geofroy v. Riggs, 133 U.S. 258, 266–267 (1890): "That the treaty power . . . extends to all proper subjects of negotiation between our government and the government of other nations, is clear . . . It is not perceived that there is any limit to the questions which can be adjusted" subject to constitutional limitations. In Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) it was said that the treaty-making power embraces "all subjects that properly pertain to our foreign relations."

[135] The McDougal & Lans article runs to some 250 pages, the bulk of which are devoted to a plea for agreements fashioned by the President with the approval of a majority of both Senate and House as distinguished from consent by two-thirds of the Senate alone. But they break more than one lance for the solo presidential agreements; ibid. 205, 223, 247–251, 311, 317, 338. With respect to the suggestion that the President has a plenary power to "make international agreements on any subject whatever," they state that "It is not necessary . . . to come to a conclusion on this point. What is completely certain is that the powers of the Congress can be superadded to those of the President, and that the two sets of power taken together are plenary"; ibid. 246. Their comment on the argument that executive agreements conduce to the "dangers of 'secret diplomacy' " points up their ambivalence:

> These arguments appear to be rooted in a simple failure to differentiate between the two principal classes of executive agreements: those perfected by the President on his own responsibility, and those made in pursuance of Congressional authorization. The Constitution of the United States is, fortunately, sufficiently flexible that it presents no necessity for choosing between the Scylla of a foreign policy dominated by a Senatorial minority and the Charybdis of simple Presidential agreements. It offers a third and thoroughly democratic alternative: the Congressional-Executive agreement, eliminating both the possibility of arbitrary, injudicious or secret action and the disintegrating effects of minority obstructionism.

Ibid. 552.

[136] Ibid. 199. They also say, "Nor does the Constitution state any limitation upon the scope of the subject matter of treaties"; ibid. 220. But McDougal and Lans

This proves too much, it may be argued, for legislatively sanctioned or approved executive agreements equally fall within the all-inclusive scope of "treaties." Consider, for example, the "detailed arrangements" under the NATO treaty that were "worked out with respect to facilities and that sort of thing, which," said the Legal Adviser, "are really to a certain extent housekeeping matters."[141] Of the same nature are executive agreements to effec-

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conclude that "all distinctions in the naming of these agreements—'treaties,' 'executive agreements,' or 'Congressional-Executive agreements'—are merely convenient labels"; ibid. 226.

Corwin also considered that "the criteria seem lacking for a nice differentiation of the prerogative under discussion [executive agreements] from the treaty making power, with the result that its curtailment . . . is a problem of practical statesmanship rather than of Constitutional Law"; Corwin, *Control*, supra, n. 30 at 120–121. Given the express provision for Senate participation in treatymaking, the all-embracing coverage of "treaty-making," any exclusion by solo presidential agreements from such participation plainly presents a problem of "constitutional law."

[137] Youngstown Case 604. Given that "treaties" cover the field, it is unimportant that the "Constitution does not provide that the treaty-making procedure is to be the exclusive mode"; McDougal & Lans 216. Ordinarily express mention of one mode is thought to exclude another, subject to rebuttal, for example, by a contrary legislative purpose. Here the legislative intention confirms the implication of exclusivity. The treaty power was granted to Senate and President jointly, as Hamilton explained, in order to "afford a greater prospect of security, than the separate possession of it by either of them"; Federalist No. 75 at 488. See supra, text accompanying n. 56.

[138] 343 U.S. at 639.

[139] Philip Kurland, "The Impotence of Reticence," 1968 Duke L.J., 619, 626. Former Chief Justice Earl Warren stated that "the constitutional role of the Senate in relation to treaties, increasingly is being bypassed through the device of non-treaty agreements between the executive and foreign governments"; N.Y. Times, Feb. 12, 1973, p. 27.

[140] Executive Agreements Hearings 79.

[141] Ibid. 75.

tuate tariff treaties.[142] Such arrangements, in the words of Henry Steele Commager, represent a "useful method for disposing of routine business that did not rise to the dignity of a treaty."[143] Must the Senate or Congress be burdened by such details? The whole history of congressional delegation teaches that such delegations are within permissible limits.[144]

Let us now examine the fourth category: executive agreements rested on the President's own constitutional powers. Here, allegedly acting "within his own domain and beyond control by Congress," the President's position, in the words of Justice Jackson, is "most vulnerable to attack and in the least favorable of possible constitutional postures."[145] The truth of this statement is strikingly confirmed by the historical-constitutional materials that bear on the treaty power.

In their zeal to forestall obstruction to a World Union after World War II by a "willful," "undemocratic" Senate minority[146] —such as blocked our adherence to the League of Nations—McDougal and Lans consigned to deepest limbo the "assumption that the treatymaking procedure is exclusive." They stamped as vain all "efforts to woo [the] enigmatic meaning" of the treaty clause; the "true intention" of the Framers they considered "a speculative domain of impenetrable obscurity."[147] However impenetrable the intention of the Framers may be in some respects, here they made clear beyond doubt that the specific objective of the treaty clause was to preclude the President from entering into international agreements without the participation of the Senate. This point is so vital, the evidence speaks so plainly, as to bear detailed exposition.

Hamilton, who has been said to reflect the consensus of the Framers,[148] stated in Federalist No. 75 that treaties are

> agreements between sovereign and sovereign . . . the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them . . . it would be utterly unsafe and improper to entrust [the entire power of making treaties] to an elective magistrate

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[142] Infra, text accompanying notes, 212–213.

[143] Fulbright Hearings 23.

[144] See supra, Ch. 4, n. 210; Professor R. J. Bartlett, Executive Agreements Hearings 16.

[145] See supra, Ch. 4, text accompanying n. 262.

[146] McDougal & Lans 187, 535, 563, 565, 567, 569, 575, 602.

[147] Ibid. 216–217.

[148] Supra, Ch. 4, n. 17.

> . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be the President of the United States . . . It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and the Senate, would afford a greater prospect of security, than the separate possession of it by either of them.[149]

A number of Framers spoke to the same effect in the Ratification conventions. James Wilson said in Pennsylvania: "if the powers of either branch are perverted, it must be with the approbation of someone of the other branches of government. Thus checked on each side, they can do no one act of themselves."[150] In South Carolina, C. C. Pinckney said: "Surely there is greater security in vesting this power as the present Constitution has vested it, than in any other body. Would the gentleman vest it in the President alone? If he would, his assertion that the power we have granted was as dangerous as the power vested by Parliament in the proclamations of Henry VIII, might have been, perhaps, warranted . . . [The Senate] joined with the President . . . form together a body in whom can be best and most safely vested the diplomatic power of the Union."[151] In North Carolina, William Davie stated that "jealousy of executive power" would not permit a grant of treaty power to the President alone.[152] Shortly thereafter, Roger Sherman, a delegate to the Constitutional Convention, stated in the First Congress that Senate and President ought to act jointly in *every transaction* which respects the business of negotiation with foreign powers . . . There is something more required than responsibility in conducting treaties. The Constitution contemplates the united wisdom of the President and Senate, in order to make treaties . . . The more wisdom there is employed, the greater security there is that the public business will be well done.[153]

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[149] Federalist No. 75 at 486–487, 488. Apparently the point loomed so large in the public mind that it had earlier been made by John Jay in No. 64, and by Hamilton in No. 69. Jay said: "The power of making treaties is an important one, especially as it relates to war, peace and commerce; it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good," i.e., as provided by the treaty clause; ibid. 417. In No. 69, Hamilton stated: "The king of Great Britain is the sole and absolute representative of the nation in *all* foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description . . . In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature"; ibid. 450–451; emphasis added.

[150] 2 Elliot 466. And he stated: "Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people"; ibid. 507.

[151] 4 Elliot 280–281.

[152] Ibid. 120.

Across the vista of forty-five years, Joseph Story restated these views.[154]

Thus, the Founders made unmistakably plain their intention to withhold from the President the power to enter into treaties all by himself, because, as Francis Corbin said in Virginia, "it would be dangerous to give this power to the President alone."[155] Hence, they circumscribed his power over foreign intercourse by requiring Senate participation in "every . . . species of convention usual among nations."[156] To circumvent that careful design by a mere change of labels, by substituting the words "executive agreements" for "treaties"—bearing in mind the absence of "significant criteria" for distinguishing between the two—is to reduce the restrictions so carefully fashioned by the Framers to ropes of sand.[157] McDougal and Lans' answer, that "To ascertain the full extent to which Congressional-Executive and Presidential agreements have become interchangeable with the treaty it is necessary to look . . .

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[153] 1 Annals of Cong. 1085 (1789), emphasis added; see also supra, text accompanying nn. 46–61.

[154] 2 Story supra, n. 134 at §1512:

> Considering the delicacy and extent of the power, it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties . . . But however proper it may be in a monarchy, there is no American statesman but must feel that such a prerogative in an American president would be inexpedient and dangerous. It would be inconsistent with that wholesome jealousy which all republics ought to cherish, of all depositaries of power.

See also ibid. §1515.

[155] 3 Elliot 509.

[156] *Letters of Camillus*, 6 Hamilton, *Works* 183. See supra, text accompanying n. 134.

[157] Compare McDougal & Lans, quoted supra, text accompanying n. 136. "As a matter of constitutional construction," Professor Henkin, 179, rejects the suggestion that "the President is constitutionally free to make any agreement on any matter involving our relations with another country" because "it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution."

Such analysis was scornfully dismissed by McDougal & Lans, 226, with the statement, "Whether an executive agreement is 'as good as a treaty' or the 'same thing as a treaty' can, furthermore, be of interest only to legal philosophers still in search of Platonic absolutes." To the contrary, it is of interest to pragmatists, who with Washington, Jefferson, and Madison, believe in a constitutional government of limited powers not to be distorted by those in power.

at the actual record of how these instruments have been used in our diplomatic practice,"[158] substitutes for constitutional limitations a presidential power to "adapt" the Constitution to his own purposes, as in the case of solo warmaking.

They maintain, moreover, that

> The Framers themselves explicitly recognized that there are international agreements other than treaties and put this recognition into the document. In Article I, Section 10 the Constitution . . . provides that "No state shall enter into any treaty, alliance or confederation," but continues that "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power." Unless one takes the position that the Framers sought to deny to the Federal Government the power to use techniques of agreement made available to the states—an argument completely refuted by the debates at the Convention and by contemporaneous history—the conclusion is inescapable that the Federal Government was intended to have the power to make "agreements" or "compacts."[159]

On the contrary, the fact that the Framers explicitly authorized the states to enter into "agreements" but omitted to do so in the case of the President implies a deliberate decision to withhold that power from him.[160] It is a non sequitur, moreover, to deduce from a grant of power to make "agreements" *with the consent* of Congress, a presidential power to make such agreements without congressional consent, let alone that such a construction would nullify the Founders' unmistakable intention to limit presidential action in the diplomatic area by the requirement of Senate consent. The rule of construction is to carry out, not to defeat, that intention.[161]

So too, the McDougal and Lans appeal to history is misconceived. Of course there was general recognition of the vices of a weak, ineffectual federal government; but to many this did not seem nearly so perilous as a potentially tyrannical central government.[162] It is also true that a woeful deficiency under the Articles of Confederation had been state noncompliance with treaties, and the Constitution therefore made treaties enforceable against the states.[163] But, as Willoughby points out, "in the State ratifying conventions the fact that treaties were to be superior to State constitutions and laws created not a little fear of possible oppression."[164] Well aware of such sentiments, the Framers had taken pains to circumscribe the power.[165] At every turn there was jealous suspicion of a centralized government and insistence upon a grudging, carefully limited grant of enumerated powers.[166] The Framers went so far as expressly to empower the President to ask for written opinions from executive department heads;[167] but under the reasoning of McDougal and Lans, the Framers had no qualms about entrusting to the President "inherent" powers of unlimited scope![168]

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[158] McDougal & Lans 261.

[159] McDougal & Lans 221.

[160] Compare T.I.M.E. v. United States, 359 U.S. 464, 471 (1959), quoted supra, Ch. 2, n. 138. Then too, the state "agreement" clause was contrived to meet a special situation. See infra, text accompanying nn. 173–174.

[161] We "cannot rightly prefer . . . [a meaning] which will defeat rather than effectuate the constitutional purpose"; United States v. Classic, 313 U.S. 299, 316 (1941). In the First Congress, Elbridge Gerry stated, "Why should we construe any part of the Constitution in such a manner as to destroy its essential principles, when a more consonant construction can be obtained?"; 1 Annals of Cong. 473.

[162] Berger, *Congress v. Court* 8–10, 31–34, 260–261.

Another factor that contributed to insistence on Senate participation in treatymaking was explained by William Davie: because of "the extreme jealousy of the little states" it "became necessary to give them absolute equality [in the Senate] in making treaties,"[169] a statement confirmed by a fellow Framer, Richard Spaight.[170] To conceive that the "little states" would then leave the barn door wide open so that the President could singlehandedly enter into executive agreements without their concurrence is to upend history. McDougal and Lans explain that "The need to propitiate the small states—a rationale whose contemporary invalidity is indicated in a subsequent section [of their article, which dwells on the diminishing importance of State's Rights]—surely might have been adequate reason for failure to state more explicitly the scope of powers conferred" on the House[171] and, by parity of reasoning, on the President. More baldly stated, this is an appeal to repudiate the representations and compromise made to secure the adherence of the small states to the Constitution, a sorry basis for the authors' high-minded plea for a more "democratic" process. In seeking the meaning of constitutional language, it is the understanding of the

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[163] Ibid. 234–235, 239, 307, 309, 372–373, 380, 381 n. 73.

[164] 1 W. W. Willoughby, *The Constitutional Law of the United States* 520 (New York, 1929).

[165] See supra, text accompanying nn. 55–64, 134, 149.

[166] For example, E. Pierce, speaking generally, stated in Massachusetts: "I believe such a superior power ought to be in Congress. But I would have it distinctly bounded, that every one may know the utmost limits of it"; 2 Elliot 77. See also Samuel Stillman, ibid. 166; supra, Ch. 3, text accompanying nn. 48–55.

[167] U.S. Constitution, Art. II, §2(1).

[168] The point was made by Justice Jackson in the Youngstown Case, 640–641, concurring; supra, Ch. 3, text accompanying n. 56.

[169] 4 Elliot 120. See McDougal & Lans 538.

[170] 4 Elliot 27.

[171] McDougal & Lans 236.

Framers that is all important. As Justice Iredell, who had fought valiantly but vainly for ratification in North Carolina, said, "We are too apt, in estimating a law passed at a remote period, to combine, in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing."[172]

Before leaving the state "compact" clause, a word as to the distinction there drawn between a "treaty, alliance or confederation," and an "agreement or compact." How does this square with the comprehensive scope given to the treaty clause by Hamilton? "Agreements" and "compacts" between some states, regulating boundaries, rights of fishery, and the like—of which the Framers were doubtless aware—had been entered into prior to adoption of the Constitution.[173] It is reasonable to infer that the "compact" clause provided for such arrangements, drawing a distinction between them and the more political "treaty, alliance or confederation," which were forbidden to the states absolutely. Given the broad understanding of federal treaties recorded by Hamilton, there is no reason to import into the treaty clause the more restricted reading of "treaty" in the compact clause. It is familiar learning that the same word may have different meanings in the different contexts of the same statute when they are directed to different purposes.[174] In any event, the decisive factor is not so much the content of "agreement" as the fact that sole use of the word in the Constitution was wedded to consent by Congress. It cannot be divorced from such consent to liberate the President from the consent of the Senate required by the treaty clause.

The view here taken is confirmed by the action of President Monroe in 1818. In 1817 his Secretary of State and the British Minister to the United States had exchanged notes providing for a limitation of naval armaments on the Great Lakes and Lake Champlain. Monroe, who had participated in the Virginia Ratification Convention, submitted the agreement to the Senate and inquired whether it is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such an one as requires the advice and consent of the Senate. . . .

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[172] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 267 (1796).

[173] Abraham Weinfeld, "What Did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'?" 3 U. Chi. L. Rev. 453, 464 (1936). Writing in 1803, Judge St. George Tucker cited the Virginia-Maryland "compact" of 1785 for the regulation of navigation on boundary waters and the like, as an example of the "agreements or compacts" contemplated by the compact clause. 1 W. Blackstone's *Commentaries on the Law of England*, App. at 310, Tucker ed. (Philadelphia, 1803).

[174] Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433–434 (1932).

The Senate, remarks Professor Bartlett, " 'approved and consented to' the arrangement and thus by implication decided it was in the nature of a treaty."[175] Not alone was Monroe doubtful of the extent to which he could step outside the treaty power, but he appropriately concluded that the resolution of a doubtful case in favor of himself was for the Senate, presumably because he did not consider that a shared power could be unilaterally altered.

Let us now turn to executive agreements said to rest on the independent powers of the President, bearing in mind that the Founders' explanation of the treaty power contains not a hint that there was to be *any* exemption from its provision for Senate participation. When asked to enumerate such agreements the Legal Adviser referred to (1) agreements for settlement of American citizens' claims against foreign nations, (2) agreements giving the Soviet government the right to assets of the prior Imperial regime, (3) armistice agreements, and (4) agreements with respect to intelligence operations.[176] These, parenthetically, do not explain the Spanish bases agreement, which involves the promise of many millions of dollars and possible deployment of troops, or the secret Japanese agreement of 1905. Professor Bickel suggests a fifth category, "an executive agreement with the Japanese about cooperation between American troops lawfully stationed in Japan, and Japanese military forces in a series of contingencies. These are tactical arrangements that the commander of troops makes for their safety . . . Congress cannot say nay."[177] Agreed that such tactical arrangement, if made in the midst of war, fall within the "first General's" conduct of a war. But if made in peacetime, they smack of the secret arrangements the British military made with the French prior to World War I;[178] and I would hold that Congress is entitled to know of all such contingent commitments so that it may measure the risks that may be involved. If, as Professor Bickel justly observes, "Congress can say . . . don't station troops in Japan,"[179] if, under its control over deployment and appropriations for the Army, it can direct that troops be with-

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175. Executive Agreements Hearings 15.
176. Ibid. 73–75.
177. Ibid. 41–42.
178. Barbara Tuchman, *The Guns of August* 46–55 (New York, 1962).
179. Executive Agreements Hearings 42.

drawn, it is difficult to conceive on what theory the "first General" may conceal from Congress contingent plans for the use of troops so deployed.

For settlement of claims agreements, whereunder claims of Americans against foreign nations may be cut tremendously[180] without compensation, the Legal Adviser invoked the Executive power and the foreign affairs power, that is, resting on his power to recognize foreign countries and receive foreign ambassadors.[181] True it is that in the *Belmont* case,[182] the Litvinov settlement was sustained as an attribute of the power of recognition; but, as Professor Bickel stated, and as will hereafter be developed in detail, one may doubt the claim for exclusive power rested on "a little snippet of a phrase" which authorizes the President to "receive ambassadors."[183] This power, Hamilton was constrained to explain, "is more a matter of dignity than of authority," and "will be without consequence in the administration of government."[184] So flimsy a base offers shaky support for a claim to oust Senate participation in the making of such settlement agreements,[185] considering particularly the confiscatory impact of such settlements on the reimbursement claims of citizens.

The power of the Commander-in-Chief to conclude an armistice may be granted, but as the Legal Adviser noted, "it does not extend to a peace treaty";[186] for, it will be recalled, the Federal Convention flatly rejected a proposal to empower the President to make a peace treaty by himself.[187] As to the "Executive power," that was conceived in terms of a power to execute the laws and slightly enriched by several *enumerated* powers. The fact that the powers to receive ambassadors and to make treaties were expressly enumerated under the "executive power" repels an inference that still other foreign affairs powers were deposited in the words "executive power" themselves.

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[180] See infra, n. 211.

[181] Executive Agreements Hearings 73.

[182] Infra, text accompanying n. 211.

[183] Executive Agreements Hearings 42.

[184] See supra, n. 17.

[185] Professor Bickel doubts "that the power to recognize a foreign government, as exercised in the Roosevelt-Litvinov agreement of 1939, is such an independent power" as is beyond the reach of Congress; Executive Agreements Hearings 26–27. President Jackson acknowledged that the power of recognition might at times require congressional consultation; supra, Ch. 4, text accompanying n. 97.

[186] Executive Agreements Hearings 74.

[187] Supra, Ch. 4. n. 164. Madison and Wilson early laid down that the executive power does not "include the Rights of war and peace"; 1 Farrand 65–66, 70. See Henkin 85, 81.

The "intelligence" agreements were rested by the Legal Adviser on the "Commander-in-Chief power and . . . legislation authorizing," for example, the Central Intelligence Agency.[188] Since Congress is to "support" the Army and "provide for the common defense," it has solid claims to intelligence that may affect such action, the importance of which will hereinafter be discussed. No intimation exists in the constitutional records that Congress was to perform such acts while blindfolded. Such an inference would run counter to the experience of the Framers who sat in the Continental Congress and closely supervised Washington's conduct of the Revolutionary War. That he would have been inhospitable to concealment from Congress by the military may be gathered from his Farewell warning to "avoid the necessity of those overgrown Military establishments which, under any form of government . . . are to be regarded as particularly hostile to Republican Liberty."[189]

The Act which set up the CIA directs it to report to the National Security Council, composed of the President and sundry Secretaries.[190] It neither requires nor prohibits the supply of intelligence to Congress; and it would be a strained construction that would erect a barrier between Congress and an agency of its own creation. Were such a construction adopted, it would be open to Congress to require that information be supplied to it, after the fashion of the Atomic Energy Act.[191] Executive agreements respecting "intelligence" cannot, therefore, be regarded as an "independent" presidential prerogative.

The all-embracing definition of treaties by Hamilton, and the important purposes that underlie the requirement of Senate "consent," justify a *presumption* that a given agreement falls within the treatymaking power. The burden of meeting that presumption, it hardly needs saying, is not satisfied by the invocation of the President's inflated and untenable theories of the Commander-in-Chief and "sole organ" functions. Neither the Senate's nor the President's determination of the issue would be conclusive on conflicting claims of power, but such claims, like all constitutional boundary disputes, should be submitted to the courts.[192]

It remains to consider a remarkable assertion by McDougal and

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[188] Executive Agreements Hearings 80.

[189] 35 Washington, *Writings*, supra, n. 66 at 221–222.

[190] 50 U.S.C. §403 et seq.

[191] 42 U.S.C. §2252.

[192] Infra, Ch. 11.

Lans: where executive "agreements are predicated upon the President's independent constitutional powers, such as in the field of foreign relations, under the separation of powers doctrine, Congressional action might not affect . . . the domestic effect of the agreement."[193] They are aware that "a treaty may be terminated . . . by a Congressional act."[194] but

> if the subject of the [executive] agreement is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief . . . the separation of powers doctrine might . . . permit the President to disregard the statute as an unconstitutional invasion of his powers.[195]

Thus, an executive agreement, nowhere mentioned in the Constitution, is exalted above a treaty for which explicit provision is made—a treaty may be repealed by Congress, not so an executive agreement!

The Commander-in-Chief power, as we have seen, is ill-suited to sustain such a claim.[196] Then too, virtually every state constitution had provided that as "Commander-in-Chief" the Governor was to act under the laws of the state, which is to say, subject to legislative governance.[197] Reiterated emphasis in the several Ratifying conventions that the President's major function was to execute the laws,[198] reinforced by the Article II, §3 provision that "he shall take care that the laws be faithfully executed," reflects the same concern and precludes any inference that the Commander-in-Chief clause conferred power which rises above the "lawmaking" powers of Congress. Least of all may such soaring power shelter in the power of "recognition," itself derived from the inconsequential power to receive ambassadors.

The crowning incongruity is McDougal and Lans' appeal to the separation of powers to protect such solo agreements from congressional invasion. What magic in the dubious, inexplicit presidential solo power calls forth a protection denied to the *express* provision for Senate participation in the all-inclusive treatymaking power? Why does respect for express constitutional provisions exhibit "mechanical filiopietistic" "slavery,"[199] whereas invocation of *implicit* doctrines, such as the separation of powers to shelter a highly dubious interpretation, is free of that taint? The answer lies in a double standard of constitutional interpretation, turning on whose ox is gored.

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[193] McDougal & Lans 338.

[194] Ibid. 334.

[195] Ibid. 317.

[196] Compare the Supreme Court statement in Tucker v. Alexandroff, 183 U.S. 424, 435 (1902) that the "commander-in-chief" would require statutory authorization for the return under treaty of Russian deserters; see infra, text accompanying n. 202.

[197] Article VII of the Massachusetts Constitution of 1780 provides that the Governor shall be "commander-in-chief," and that his powers shall "be exercised agreeably to . . . the laws of the land and not otherwise"; 1 Poore 965–966. For Delaware, Art. 9, ibid. 275; for New Hampshire (identical with Massachusetts), 2 Poore 1288.

[198] See supra, Ch. 3, text accompanying nn. 18–23.

B. *Supreme Court Decisions*

Constitutional "law" seldom exhibits such frail underpinning as was mustered by McDougal and Lans for judicial recognition of solo presidential executive agreements. Consider their reliance on *Tucker v. Alexandroff*,[200] in which "the Supreme Court intimated by way of dictum that the President was empowered to make agreements permitting passage of foreign troops through the United States and could thereby divest all American officials of jurisdiction over such a military force."[201] The issue presented was whether a member of the Russian navy, who had deserted while awaiting the launching of a Russian warship in Philadelphia, came within a Russian treaty calling for return of deserters from Russian ships. In passing, the Court remarked:

> While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief. . . . It may be doubted, however, whether such power could be extended to the apprehension of deserters in the absence of positive legislation to that effect.[202]

As Corwin said, the question of the validity of "this species of agreement" was "touched upon in rather equivocal terms."[203] If this be judicial recognition of executive agreements, the Court's emphasis that return of deserters required legislative assent confines it to the narrowest compass.

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[199] See supra, Ch. 4, text accompanying n. 162.

[200] 183 U.S. 424 (1902).

[201] McDougal & Lans 310. The suggestion that the President could "divest all American officials of jurisdiction" is wide of the mark. After a review of the cases the Court stated: "In none of these cases, however, did a question arise with respect to the immunity of foreign troops from the territorial jurisdiction, or the power of their officers over them"; 183 U.S. at 435. The Court, as will appear, gave limited recognition to a presidential assumption that he could "permit the introduction of foreign troops," no more.

[202] 183 U.S. at 435.

[203] Corwin, *Control,* supra, n. 30 at 118.

Next, McDougal and Lans state:

> [T]he general powers of the President to make executive agreements seems to have been first touched by the Supreme Court in 1933, in *Monaco v. Mississippi* wherein Chief Justice Hughes stated: "The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, *through treaty, agreement of arbitration, or otherwise.*[204]

The question in *Monaco* was whether a state could be sued by a foreign state without her consent; whether the President could make an executive agreement by himself was not in issue. Hughes's reference to the power of the "National Government" to act does not necessarily imply that the President is authorized to act without the consent of the Senate. A redistribution of constitutional powers should not rest on strained inferences.[205]

McDougal and Lans next summon the *Curtiss-Wright* case.[206] That case, it will be recalled, was later dismissed by Justice Jackson because it "involved, not the question of the President's power to act without congressional authority, but the question of his right to act in accordance with an act of Congress."[207] Justice Sutherland's dictum regarding the President's inherent powers is without historical foundation; his reliance on Marshall for the statement that "participation in the exercise of the power [over external affairs] is significantly limited"[208] all but perverts Marshall's "sole organ" remark.[209]

"The dicta of the *Monaco* and *Curtiss-Wright* cases," McDougal and Lans tell us, "were the capstones of the decisions in the *Belmont* and *Pink* cases, dealing with the validity and interpretation of an assignment of Russian-owned assets in the United States, which was one of several executive agreements negotiated when the United States recognized the Soviet government in 1933."[210] In the *Belmont* case, Justice Sutherland once more delivered himself of untenable dicta:

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[204] McDougal & Lans 310, quoting 292 U.S. 313, 331 (1934).

[205] As the Supreme Court stated in Brady v. Roosevelt Steamship Co., 317 U.S. 575, 580–581 (1943), "Such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture." See also supra, Ch. 3, text accompanying n. 12.

[206] McDougal & Lans 255–256, 310.

[207] Youngstown Case, 343 U.S. at 635–636 n. 2, concurring. Curtiss-Wright merely held that the congressional delegation to the President was constitutional; 299 U.S. at 327–328.

[208] 299 U.S. at 319. For refutation of Sutherland's "inherent" power dictum, see supra, Ch. 4, text accompanying nn. 205–235, 244–251.

[209] See supra, text accompanying nn. 81–88.

> in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution . . . require the advice and consent of the Senate.[211]

No account was taken by Sutherland of the history which demonstrates the Founders' intention to withhold from the President the right to enter into international agreements without Senate consent. Instead, he reasoned from *B. Altman & Co. v. United States*[212] that an international compact may be distinguished from a treaty. There a reciprocal agreement had been made with France under authority of the Tariff Act; and the sole question was whether Congress, by permitting a direct appeal to the Supreme Court with respect to treaties, intended to encompass such a compact. In answering this question the Court stated, "True, that under the Constitution . . . the treaty-making power is vested in the President, by and with the advice and consent of the Senate," but it concluded that the reciprocal agreement "was a *compact authorized by the Congress* . . . [and] *such a compact* is a treaty" for the purposes of the appeals statute.[213] In treating the authorized compact as a treaty for the purposes of a special appeals statute, the Court did not purport to sanction executive agreements not authorized by Congress, a jump unhesitatingly made by Justice Sutherland.

Belmont also leaned on the power of "recognition," to which the Litvinov Agreement was incidental.[214] That power was derived from the presidential function of "receiving foreign ambassadors,"[215] which Hamilton downgraded as a mere matter of "dignity," of "no consequence." The Framers hardly intended by this inconsequential function to authorize the President to evade Senate consent to treaties for which they so painstakingly provided, particularly treaties of serious import. When recognition might lead to grave consequences, such as war, President Jackson considered that it should be exercised in consultation with Congress.[216] Lincoln went even further. Referring to recognition of "Hayti" and Liberia, he stated "Unwilling . . . to inaugurate a novel policy [recognition] in regard to them without approbation of Congress, I submit for your consideration the expediency of an appropriation for maintaining a chargé d'affaires near each of those new States."[216a] Because recognition has become "a most potent instrument of foreign policy,"[217] it calls for critical reappraisal rather than, as in the misplaced reliance on Marshall's "sole organ" remark, mechanical repetition.

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[210] McDougal & Lans 311.

[211] United States v. Belmont, 301 U.S. 324, 330 (1937). Sutherland disposed of the issue in lordly fashion: that the agreements "were within the competence of the President may not be doubted." Earlier he had stated that "international agreements which are not treaties in the full constitutional sense, are perhaps confined to such as affect administrative matters, as distinguished from policies, and those which are of only individual concern, or of limited scope and duration, as distinguished from those of general consequence and permanent character"; Sutherland, supra, n. 24 at 121.

Borchard, supra, n. 119 at 647, stated that about 5 million dollars were accepted in return for the sacrifice of 300 million dollars in American claims arising out of confiscations in Russia.

[212] 224 U.S. 583 (1912).

[213] Ibid. 600, 601; emphasis added.

[214] United States v. Belmont, 301 U.S. 324, 330–331 (1937).

Justice Stone, in an opinion joined by Justices Brandeis and Cardozo, concurred in *Belmont* with a significant reservation:

> We may, for present purposes, assume that the United States, by treaty . . . *could alter the policy* which a *State might otherwise adopt*. It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations . . . nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any *state policy is to be overridden.*[218]

And so we arrive at *United States v. Pink*,[219] in which the issue reserved by Justice Stone was presented, and where Justice Douglas, citing *Belmont* and *Curtiss-Wright*, stated that the

> Litvinov Assignment was an international compact which did not require the participation of the Senate. . . . Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations."[220]

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[215] Cf. Henkin 47.

[216] Supra, Ch. 4, text accompanying n. 97; cf. supra, text accompanying n. 183.

[216a] 6 Richardson 47.

[217] Corwin, *President* 230.

[218] 301 U.S. at 336; emphasis added.

[219] 315 U.S. 203 (1942).

[220] Ibid. 229. The government had argued that "The authority of the President to enter into executive agreements with foreign nations without the consent of the

The *Pink* case had no occasion to rule that a presidential agreement could be made against the wishes of Congress; and in fact Justice Douglas said that the executive policy had been "tacitly" recognized by congressional appointment of commissioners to determine American claims against the Soviet fund.[221] The dissent of Chief Justice Stone, in which Justice Roberts joined, is incontrovertible: "we are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate."[222]

We need only recall Davie's references to the prevalent distrust of executive power,[223] to the jealous insistence by the small states on participation in treatymaking on an equal basis in the Senate,[224] to the fears that surfaced in the Ratification conventions—despite Senate participation—that the power to override state laws might lead to oppression,[225] in order to conclude that without Senate participation the treaty power would not have found acceptance. To allow an executive agreement to override state law or policy on the ground that it represents "a modest implied power" is to ignore the Founders' plain intention to withhold that power from the President.

This is confirmed by Article VI, which makes only "Laws" and "Treaties" the "supreme law of the land" binding upon the states.[226] An executive agreement is not a "treaty" because it lacks the "advice and consent" of the Senate; it is not a "law" because it was not "made" by the Congress.[227] Justice Sutherland all too lightly leapt over these obstacles; while the supremacy of treaties, he said,

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Senate *is established*," ibid. 208, citing Monaco and Curtiss-Wright; emphasis added. Thus are mere dicta transmuted into "established" law.

[221] Ibid. 227–228.

[222] Ibid. 249. McDougal & Lans, 310, also rely on Watts v. United States, 1 Wash. Terr. 288, 294 (1870), for the proposition that "an executive agreement between Great Britain and the United States . . . with regard to jurisdiction over San Juan Island, was deemed to modify the Organic Law of the territory as enacted by Congress." Whether one can extract such a holding from the three separate opinions in the case is at least debatable. Whatever the effect of the opinion of a territorial court, it may be doubted that the Supreme Court would allow a presidential agreement to override an Act of Congress. See infra, text accompanying n. 232.

[223] See supra, text accompanying n. 152.

[224] See supra, text accompanying n. 169.

[225] See supra, text accompanying n. 164.

[226] For discussion of the "binding" phrase, see Berger, *Congress v. Court* 236–244.

[227] Discussing Art. VI, James Iredell stated that "when the Congress passes a law consistent with the Constitution, it is to be binding"; 4 Elliot 179. At this juncture men thought that judges ascertained the law; they did not "make it."

is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.[228]

Be it assumed that plenary power over "international affairs" resides in the "national government," and it by no means follows that it was vested in the President.[229] Then too, actuated by profound distrust of centralized federal power and deep-seated attachment to local state sovereignty,[230] the people consented to be "bound" *only* by "laws" and "treaties," and, as we have seen, accepted "treaties" only when participation of the Senate was assured.[231] Sutherland would repudiate these assurances in reliance on his impalpable theory of supraconstitutional federal "sovereignty" and "inherent" powers. But the Founders did not fashion a government of limited powers, they did not circumscribe both President and Congress by an enumeration of powers, they did not then go on to reserve all "powers not delegated . . . by the Constitution" only to turn over to the President an unbounded power to set these limitations at naught.

At best, the not so "modest implied power" of the President to enter into such agreements with the tacit consent of Congress amounts to no more than a concurrent power that Congress can curtail by statute, as Justice Jackson reminded us in the *Youngstown* case.[232] Were the issue presented anew by a congressional challenge, embodied in a statute, to presidential entry into executive agreements without its consent, the cases would be far from conclusive.[233] Even *Curtiss-Wright* did not intimate, said Justice

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[228] United States v. Belmont, 301 U.S. 324, 331 (1937). To the extent that his statement turns on an assumption of supraconstitutional, "inherent" powers, of "sovereignty," it was earlier shown to be untenable; supra, Ch. 4, text accompanying nn. 211–235.

[229] Supra, Ch. 4, text accompanying n. 215.

[230] For distrust of centralized power, see Berger, *Congress v. Court* 8–9, 31–34; for attachment to state sovereignty, ibid. 260–263, 224.

[231] Supra, text accompanying nn. 148–156.

[232] 343 U.S. at 637–639, concurring. Given concurrent powers, Chief Justice Marshall held in an early war-powers case, a congressional statute must prevail; Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–178 (1804).

[233] Professor Henkin comments that the cases exhibit "the vagaries of judicial incursions [into foreign affairs] that are infrequent and develop no confident mastery"; Henkin 64. At another point he states: "To some extent judicial difference in relation to foreign affairs has been the product of conceptualisms about sacrosanct 'sovereignty,' of unexamined assumptions reflected in incantations about 'war and peace,' of set

Jackson in the *Youngstown* case, that the President "might act contrary to an act of Congress."[234]

When Rufus King, who participated in shaping much of the foregoing history—from the Continental Congress' preclusion of secrecy, through framing presidential participation in treaty-making, to selection of John Jay as plenipotentiary to Britain and programming his mission—stated that the Senate may "at any time call for full and exact information respecting the foreign affairs,"[235] he knew at first hand whereof he spoke. The pattern had been set by the Hanoverian period, in which the "participation of parliament in foreign affairs and even its supervision of them was . . . fully recognized."[236] The constitutional treaty-power clause, Corwin truly said, "evidently assumed that the President and the Senate will be associated throughout the entire process of making a treaty,"[237] the reason, in Hamilton's words, being that "the vast importance of the trust . . . plead[s] strongly for the participation . . . of the legislative body in the office of making them." "Joint possession" of the treaty power, he continued, affords "greater prospect of security, than the separate possession of it by either" Senate or President.[238] There can be no meaningful "participation" in the exercise of a "joint" power by a partner who is kept in total ignorance by the other. Presidential concealment of foreign affairs from the Senate finds no excuse in constitutional history; instead it thwarts the manifest intention of the Founders.

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habits of thought about international relations, about how they are conducted, about the 'proper' role of courts in regard to them"; ibid. 272.

Neither *Belmont* nor *Pink* presented a conflict between Congress and the President. Were Congress to assert its constitutional powers, by statute or otherwise, the judicial function of policing constitutional limitations should impose the duty of adjudicating the conflicting boundary claims. See infra, Ch. 11.

[234] 343 U.S. 635–636 n.

[235] Supra, text accompanying n. 110.

[236] Supra, text accompanying n. 40.

[237] Supra, text accompanying n. 31; and see supra n. 63.

[238] Supra, text accompanying n. 56. Henkin, 84, concludes with characteristic understatement that "the theoretical arguments for Congressional primacy [in the field of foreign relations], or at least concurrent authority, are not less persuasive than those for the President." And, he states: "The Executive must learn to conduct foreign relations with less secrecy and greater responsibility. Congress must have a timely, honest, meaningful role, and the flow of information to fulfill it"; ibid. 279.

PANAMA CANAL TREATY (DISPOSITION OF UNITED STATES TERRITORY)

TUESDAY, NOVEMBER 15, 1977

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON SEPARATION OF POWERS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 1114, Dirksen Senate Office Building, Senator James B. Allen of Alabama (chairman of the subcommittee), presiding.

Present: Senator Hatch of Utah.

Staff present: Quentin Crommelin, Jr., chief counsel and staff director, and Melinda Campbell, chief clerk.

Senator ALLEN. The subcommittee will please come to order.

OPENING STATEMENT OF CHAIRMAN ALLEN

The Subcommittee on Separation of Powers is convened this morning to continue the subcommittee's investigation of constitutional issues arising out of the proposed Panama Canal treaties. I am certain that most of those present this morning are aware of the two central constitutional issues under investigation; however, perhaps I should again state the propositions which are the focus of the committee's inquiry.

First, article IV, section III, clause 2 of the Constitution of the United States provides that Congress—that is, both Houses of Congress—"shall have power dispose of * * * the territory or other property belonging to the United States." Many witnesses have testified before the committee that the power given to Congress in that clause is exclusive and therefore that the executive branch is prohibited from entering into a treaty disposing of U.S. territory or property except with express congressional authorization by statute.

Prof. Raoul Berger, of the Harvard Law School, and Prof. Charles Rice, of the Notre Dame Law School, both eminent scholars of the Constitution, have testified that the power of Congress to dispose of territory or property is an exclusive power and that a treaty disposing of property concluded without congressional authorization would be void insofar as it purported to transfer territory or property without congressional assent.

Second, members of the committee are also deeply concerned that the executive department has made certain financial commitments to the Government of Panama pursuant to executive agreement not included in the provisions of the canal treaties nor in the provisions of the other executive agreements which accompany the treaties. These separately consummated financial deals were apparently negotiated concurrently with the treaty provisions during the treaty negotiations, and certainly there is therefore reason to be concerned that these arrangements are properly a part of the proposed treaties or, at a minimum, a part of the executive agreements accompanying the proposed treaties. The committee will consider whether these extrinsic financial arrangements for some $345 million violate the doctrine of separation of powers—much as does the contemplated circumvention of the Congress on the property disposal issue—because these extrinsic financial deals deny to the Senate the right to give its advice and consent to all aspects of the new proposed treaty arrangements with Panama.

A related problem which has also been subject to investigation in the committee is the manner in which funds would be transferred to the Republic of Panama using a new Panama Canal Commission for the purpose of providing promised money to Panama without the necessity of seeking an appropriation from the Congress. The members of the committee, I am sure, are concerned that apparently the executive branch intends to transfer the assets of the present Panama Canal Company to a new Panama Canal Commission which would eventually be turned over to Panama but that the executive branch does not intend to transfer some $319 million in liabilities to the new Commission. That is the present debt of the Panama Canal Company to the U.S. Treasury.

So the committee is greatly interested in examining in depth each of these issues, and we feel that substantial progress has been made in understanding the facts involved. Today we expect to make even greater progress in our inquiry since today we will have the benefit of hearing the testimony of Secretary Richard Cooper, Under Secretary for Economic Development. Secretary Cooper took part in some of the negotiations involved in concluding these financial arrangements and has intimate knowledge of the process by which these commitments were made. Secretary Cooper is accompanied by Hon. Herbert Hansell, legal adviser to the Secretary of State, who has previously appeared before the committee to give the committee the benefit of his expertise on certain of the legal issues now subject to inquiry.

I might say that I am very pleased that Secretary Cooper has made arrangements to appear before the committee today because I know that his schedule is very demanding, as is that of Mr. Hansell. I do feel that the administration might have avoided some of the pitfalls in the negotiation of these treaties by advising with the Senate during the negotiating process because I believe that some of the many defects which have arisen in connection with these proposed treaties might thereby have been precluded. But now that the treaties have been signed, I am gratified that the administration is developing a more open attitude in explaining the provisions adopted. Certainly Secretary Cooper's testimony and that of Mr. Hansell will be of assistance to the committee and to the Senate in furthering the process of understanding these proposed treaties.

Secretary Cooper, we look forward to hearing your testimony. You may proceed in such fashion as you deem appropriate.

TESTIMONY OF RICHARD N. COOPER, UNDER SECRETARY OF STATE FOR ECONOMIC AFFAIRS

Secretary Cooper. Thank you, Mr. Chairman.

As you have indicated, I am here at your invitation to discuss arrangements for economic cooperation betwen the United States and Panama which will complement the process of implementing the new Panama Canal Treaties signed by President Carter and Panama's General Torrijos on September 7. Since the subcommittee's hearings are directed primarily toward the legal and constitutional implications of these arrangements, Mr. Herbert Hansell, the Department of State's legal adviser, is also present and will make a brief statement following my own. As requested in your October 28 letter to Secretary Vance, I will direct my remarks to the substance of the economic cooperation arrangements rather than to the related legal and constitutional questions.

The program of economic cooperation developed out of the canal negotiations but is separate and independent from the Panama Canal Treaty.

Perhaps it would be best to start with the background. At the start of the negotiations which led to the new canal agreements, the United States and Panama agreed, in the February 1974 Kissinger-Tack statement of principles, that Panama should receive a "just and equitable share of the benefits derived from the operation of the canal in its territory." Consistent with this principle, the United States maintained during the negotiations that Panama's share of the economic benefits from the canal should be drawn entirely from canal revenues; that is, that payments to Panama should reflect the canal's economic value as measured by its own revenue-generating capacity.

Panama's negotiators proposed that the United States pay Panama a large initial lump-sum payment and a very sizable annuity, either of which far exceeded the most optimistic estimates of gross canal revenues. The Panamanian negotiators sought to justify these proposals by assigning high economic value to the economic and security benefits derived by the United States from the canal, without comparable benefits to Panama. They further suggested that as a counterpart to U.S. investment in the Panama Canal, Panama had provided its unique geographic location and much of its prime land and water resources, as well as the labor of its people, to the canal effort. Panama also cited the low remuneration received by Panama under the present treaties and the value to our security interests of the military bases and the new neutrality arrangements.

Finally, the Panamanian negotiators stressed the importance to Panama of being able to obtain the resources to undertake rapid social and economic development with wide distribution of benefits to its people.

The final result, as you know, was that the new Panama Canal Treaty embodied the U.S. position. With regard to the canal enterprise, Panama is to receive annual payments which will be drawn entirely from canal revenue.

At the same time, the U.S. negotiators recognized that there was considerable merit, from the standpoint of the future U.S. interest in the canal, to giving attention to Panama's development needs. The United States and Panama under the new treaties would share a special relationship created by mutual interest in the canal. Panama's development could foster the stability which is the underpinning for an open, safe, efficient, and accessible canal before and after the expiration of the Panama Canal Treaty.

The U.S. negotiators therefore arranged for their Panamanian counterparts to meet with representatives of the Departments of State and the Treasury, the Agency for International Development, and the Export-Import Bank to consider Panama's development needs. In doing so, it was clearly understood that any arrangements to assist with Panama's development were to be separate from the canal agreements and were in no way to be tied to the rights and obligations of the United States under the Panama Canal Treaty and the Neutrality Treaty.

Out of these discussions emerged a program which was set forth in a diplomatic note signed by Secretary of State Vance on September 7. This program was designed to utilize financial assistance programs that are suitable to Panama's stage of development and directed at meeting Panama's present economic needs for low income housing and a revived private economic sector. It is undertaken on a best-efforts basis. It introduces no special assistance devices and is subject to all applicable procedures under existing programs. All of its elements fit within existing statutory authorization.

The components of the economic cooperation program are as follows:

First, up to $75 million in AID housing guarantees over a 5-year period.

Second, up to $200 million in Export-Import Bank loans, loan guarantees, or insurance over a 5-year period subject to approval by the Bank.

Third, a guarantee by the Overseas Private Investment Corporation of $20 million in U.S. private capital to the Panamanian National Finance Corporation, COFINA, for the use in productive projects in the private sector.

In addition to these economic programs, the Secretary's note of September 7 also proposed issuance of repayment guarantees under our foreign military sales program not to exceed $50 million over a 10-year period. These guarantees are to assist Panama in meeting its responsibilities to contribute to canal defense under the Panama Canal Treaty.

Let me add a few comments about each of the components in the cooperator program.

The AID housing program is directed toward housing for lower-to-medium income groups in less developed countries. The program provides full faith and credit U.S. Government guarantees to private U.S. lenders who make loans for housing projects in less developed countries.

The 5-year program for Panama would fit within existing authorization. The guarantee program, which began in the 1960's, is designed to be self-sufficient and has not required congressional appropriations. Total current housing guarantee authority is $1.055 billion. The proposed Panama program would conform to the statutory limitations of $25 million per year to any one country and an average annual face value of $15 million.

As for the Export-Import Bank component. Panama is expected to become an expanding market for U.S. exports after the canal issue is settled and investment in Panama accelerates. This projected market expansion is expected to give rise to more applications for Eximbank support, but at a minimum Eximbank has indicated that its business in Panama could well amount to the $200 million we have been discussing over the next 5-year period.

The portfolio risk to Eximbank as a result of this offer will be small. With an additional $200 million to Panama over 5 years, exposure in Panama will amount to less than 1.37 percent of Eximbank's total existing portfolio. Projected risk will be controlled in the usual manner, since each transaction will be subject to normal Eximbank financial, legal, and engineering criteria, including the Eximbank's statutory requirement to find a reasonable assurance of repayment.

Concerning the Overseas Private Investment Corporation guarantee, this will be the first instance in which OPIC has participated in financing the expansion of a government-owned development bank, although OPIC is permitted to do so by longstanding OPIC Board policy guidelines. The Panamanian Development Bank, COFINA, is engaged in supporting the development of private enterprises in Panama through project lending. The guarantee of borrowing by COFINA would therefore be wholly compatible with OPIC's mission and in accord with our view that OPIC should help strengthen the private sector of Panama's economy. The guarantee would raise OPIC's exposure in Panama to only 8.5 percent of its total existing portfolio, which we believe to be a reasonable risk. A Panamanian Government guarantee will further reduce OPIC's risk. OPEC has stipulated that its offer to Panama depends on terms being negotiated which are acceptable to OPIC's Board.

Finally, the military sales guarantees, like other components of the cooperation program, are not grants to be financed by the American taxpayer. The only appropriations required would be to cover 10 percent of the annual program in the form of deposits in a special reserve account.

These, then, are the components of the United States-Panamanian cooperation program which developed from the canal negotiations. They rely on existing programs which are proven tools for furthering U.S. interests abroad. All offers of assistance under this program are subject to compliance with legal and managerial requirements of the institutions involved and to the availability of funds. They are separate from the Panama Canal Treaty because they do not relate to our rights and obligations under that treaty. But we expect them to make a positive contribution to the successful implementation of the new United States-Panamanian partnership in the canal enterprise which will grow out of the new treaties.

Thank you, Mr. Chairman.

Senator ALLEN. Thank you, Secretary Cooper.

I believe it would be a more orderly procedure if we heard at this time from you, Mr. Hansell, so that then we might direct questions to both of you or either of you, as the case might be. Therefore, please proceed with your testimony.

TESTIMONY OF HERBERT J. HANSELL, LEGAL ADVISER OF THE DEPARTMENT OF STATE

Mr. HANSELL. Thank you, Mr. Chairman.

It is a pleasure to appear before you this morning to discuss the legal status of the note regarding economic and military cooperation which was transmitted to the Ambassador of Panama by the Secretary of State on September 7 of this year.

I believe it is important to understand at the outset that this instrument does not constitute an agreement. It is in the form of a unilateral diplomatic communication from the Secretary of State to the Panamanian Ambassador. No response to the document was requested or received from the Panamanian Government. The penultimate paragraph of the document clearly states that "the undertakings of the United States provided for herein will enter into force upon an exchange of notes to that effect between our two Governments." Therefore, the document will establish no obligation in a legal sense until such time as the United States and Panama enter into an agreement to bring it into effect. Rather, the document constitutes an assurance of intent to enter into a specific agreement at a future date.

I would now like to describe briefly the nature of the obligations the United States would assume once such an exchange of notes takes place. As the document clearly provides, the various undertakings set forth are to be within the limitations of U.S. law and subject to compliance of the contemplated programs with all applicable legal requirements. Thus, upon entry into force of the undertakings, the commitment would be that the United States would take the necessary measures within the authority conferred by law to bring into being the specified programs of economic and military cooperation. There would be no legal obligation to do anything not authorized by U.S. law. Moreover, each of the programs described is either made subject to applicable administrative and statutory criteria or is subject to terms to be approved by a U.S. Government agency responsible for the program. Each proposed project or transaction will be subject to review in the same manner as other similar proposed projects and transactions.

I now propose to take up a question in which I understand this committee has expressed particular interest: Why were these arrangements set forth in the form of a diplomatic note rather than as part of the Panama Canal Treaty?

In addressing this question, I believe it would be useful to recapitulate briefly a bit of the background of these arrangements about which Under Secretary Cooper has already testified in some detail.

During the negotiation of the treaties, the parties recognized their mutual interest in assuring the continued soundness and stability of Panama's economy, to enable it to carry out its new responsibilities in an effective manner. Understanding was reached that the United States would consider with Panama how it might cooperate in this regard under programs authorized by existing U.S. legislation. Arrangements were made for exploration of the possibilities for cooperation by officials of both governments other than the treaty negotiations.

It was not considered appropriate or desirable to link these potential arrangements in any way with the rights and responsibilities of the parties under the new treaties. For the same reason—to avoid any implication of a legal linkage between the cooperative programs and the rights and obligations of the parties under the treaties—it was considered important that the treaties should not mention such programs and that the note describing the programs should not refer to the treaties.

The relevant documents reflect these considerations. The legal rights and obligations established by the treaties are not in any way dependent upon the fulfillment of the intentions of the parties reflected in the note. Irrespective of what may occur with respect to these cooperative arrangements, the Panama Canal treaties, once ratified, stand independently and cannot be affected.

The understandings of the parties with respect to the contemplated economic and military cooperation programs have been set forth in a form which is entirely appropriate and highly desirable from the standpoint of the United States. There is no question as to the authority of the executive branch under existing law to enter into such understandings.

Mr. Chairman, that concludes my presentation. I will be pleased to join Under Secretary Cooper in responding to any questions the committee may have.

Thank you, Mr. Chairman.

Senator ALLEN. Thank you very much, Mr. Hansell.

Secretary Cooper, would you describe briefly your present duties for the Department of State and tell how long you have been in your present job?

Secretary COOPER. Yes; I went to work for the Department of State in my current job in practice in January but, in fact, I was not finally confirmed until sometime in April of this year, 1977.

As my title suggests, I have overall responsibility for foreign economic policy of the United States insofar as that is lodged in the State Department. There are parts of foreign economic policy for which other departments of the Government have the principal responsibility. In those instances I act as a liaison between the State Department and those other departments.

I have no formal line responsibility.

Senator ALLEN. Were you with the Department of State prior to your appointment as Under Secretary of Economic Affairs?

Secretary COOPER. About 12 years ago I spent 1 year at the Department of State.

Senator ALLEN. There was a hiatus of some 12 years?

Secretary COOPER. Yes, that is right.

INFORMAL MEETINGS WITH BARLETTA

Senator ALLEN. You did participate in certain of the negotiations here in Washington with Minister Nicholas Barletta of the Republic of Panama, the Minister for Economic Planning and Development there, did you not?

Secretary COOPER. I participated in three meetings with Minister Barletta. We made clear to the Panamanians that we did not regard those meetings as negotiations.

One was a rather formal meeting in which we heard an elaborate statement of the Panamanian case for an economic component of these negotiations. Our role during that meeting—and I chaired the American side—was primarily to listen to that case and to ask a number of questions.

Subsequent to that I met in a small group informally with Minister Barletta along the Under Secretary Solomon of our Treasury Department. We had discussions concerning the Panamanian request and the basic principle of the desirability of some kind of economic assistance for Panama, the extent to which we Americans had a stake in the viability of the Panamanian economy and policy. We had two sets of informal discussions and talked about the things that might be done and about the things that could not be done in the context of Panamanian economic development.

Senator Allen. You had two meetings in all?

Secretary Cooper. That is correct.

Senator Allen. It seems from what you say that they were all merely preliminary discussions. When did you reach the agreement that was finally reached?

SEVERAL OPTIONS CONSIDERED

Secretary Cooper. I was not present when the final agreement was reached. On the basis of these discussions we in the U.S. Government put together a series of options, as they are called, or various ways in which we could assist the Panamanian economy. There was a discussion in the Policy Review Committee, which is a Cabinet-level committee that looks at such matters of foreign policy across the board. As a result of those discussions, a paper was put to the President containing recommendations very much along the lines of what came out. There were some changes in detail. The President approved those discussions.

Senator Allen. You came to the Department in April?

Secretary Cooper. I came formally into my job in April; that is correct.

Senator Allen. You did not participate in any of the meetings and conferences until you were named to your present position; is that correct?

Secretary Cooper. That is correct.

Senator Allen. What was the status of the negotiations at the time you came to the negotiating table?

Secretary Cooper. I am not quite sure how to answer that.

Senator Allen. At what stage did you find the negotiations when you started?

Secretary Cooper. The negotiations were in an intense phase of discussion. As you know, Ambassador Linowitz was asked to join Ambassador Bunker in these negotiations early on in the new administration. During the course of the spring there had been intense discussions between the American negotiators and the Panamanians. They had reached a wide measure of agreement on some issues. This was in June. They were still some distance apart on other issues. I would describe the status of the negotiations as still constructive. They had not reached an impasse but neither had they reached final agreement as yet.

SUBSTANTIAL CASH PAYMENT

Senator Allen. Were they not demanding a cash payment of several hundred million dollars at the time you entered into the negotiations?

Secretary Cooper. I would not describe what I heard as a demand on the Panamanian side. They did put forward a case for a very substantial economic payment running well beyond a few million dollars. It was a rather, I would say, carefully, skillfully-worked-out case based on historical analysis going right back to the early part of the century.

As I indicated a moment ago, we listened to that case with interest. We asked a number of questions but we indicated in our discussions with Minister Barletta and others that we felt that while that was an interesting historical analysis we should look forward rather than backward, and that our mutual interest in this domain was in the future prospects and prosperity of the Panamanian economy.

Essentially we set to one side the Panamanian case.

Senator Allen. Their attitude, then, was not of a demanding nature?

Secretary Cooper. I would not so describe it, no. They were, however, insistent that Panama should receive greater economic benefits from the location of the Panama Canal and so forth than they had historically. They were quite emphatic on that point.

Senator Allen. Following the conference in which you participated, by whom were the final touches put on the unilateral statement, as I believe it has been called?

Secretary Cooper. Are you referring to the economic cooperation statement?

Senator Allen. Yes.

Secretary Cooper. On the strength of the President's decision, our negotiators discussed with the Panamanians what we were willing to do in the economic area.

Senator Allen. In other words, the President decided what the United States would give Panama; is that correct?

Secretary Cooper. The President decided what elements of economic cooperation the United States would engage in with Panama; yes.

Senator Allen. What options did you submit to the President, or did you submit to the President through an intermediary, in addition to the option that was finally agreed upon? Did you submit options calling for payments of sums of money to Panama direct by the U.S. Government.

Secretary Cooper. No; we did not. That was not among the options. I would have to look at the paper again to remind myself what exactly went forward.

There was only one option, speaking in gross terms, that did not go into the final package which was discussed extensively at that stage. It was a rather complicated arrangement for financial support of Panamanian development but it would not have involved direct payments by the U.S. Government to Panama. We in the end rejected that option.

AMERICAN IDEA TO USE LOANS RATHER THAN CASH

Senator ALLEN. Whose idea was it to shift from the Panamanian demand of a direct payment by the U.S. Government in cash to Panama over to the system of providing some $345 million in loans and guarantees?

Secretary COOPER. Do you mean whether it was an American idea or a Panamanian idea?

Senator ALLEN. I assume it was an American idea because the Panamanians were demanding cash. What I want to know is who came up with the alternative suggestion that you avoid seeking appropriations from Congress and instead go the route of furnishing loans and guarantees?

Secretary COOPER. I cannot recall which individual. There were a number of people working on this range of issues. I cannot recall which individual or individuals came up with that particular idea or that cluster of ideas, but it did come from the American side, not from the Panamanian side.

APPROPRIATIONS AVOIDED—ALMOST

Senator ALLEN. Was some discussion held by the American negotiators of the need to come up with a plan that would avoid seeking appropriations from Congress?

Senator ALLEN. Excuse me. I did not hear that.

Secretary COOPER. In the preliminary discussion of the economic package the negotiators themselves were not directly involved.

Secretary COOPER. In the framing of the economic package the negotiators themselves—that is, Ambassadors Lenowitz and Bunker—were not directly involved.

As I said, the Panamanians made their presentation. Under Secretary Solomon and I subsequently had two informal conversations with Minister Barletta in which we had indicated that while the historical analysis was interesting we did not view it as relevant to either our or Panamanian concerns, and that we should be future oriented rather than historically oriented We agreed that we had a common interest in the prosperity of the Panamanian economy. We were concerned to do what we could do to help insure that prosperity, which we see as an integral part of the effective, efficient, and secure operations of the canal.

Senator ALLEN. Now you say that you do not recall who it was but that somebody on the American team came up with the idea of substituting the loans and guarantees for an appropriation from the U.S. Treasury by the Congress; is that correct?

Secretary COOPER. At some point when we were looking around to see what could be done in this framework of economic development the staff—and Treasury and State were both involved in this—produced a series of suggestions of what might be done.

APPROPRIATIONS BY CONGRESS

Senator ALLEN. Did the negotiating team seek to provide alternatives to an appropriation by the Congress?

Secretary COOPER. We did not discuss an appropriation by the Congress for this.

Senator ALLEN. You wanted to avoid that?

Secretary COOPER. I am not sure we wanted to avoid it, but we didn't discuss it.

Senator ALLEN. You did avoid it.

Secretary COOPER. We did avoid it—well, almost.

Senator ALLEN. Sir?

Secretary COOPER. Almost. I mean the military sales program does, as you know, under existing framework require an appropriation for a guarantee fund.

Senator ALLEN. That is what, 10 percent of the amount?

Secretary COOPER. Ten percent of the amount.

Senator ALLEN. That is $5 million.

Secretary COOPER. $5 million over a 10-year period.

Senator ALLEN. That would not be much of an obstacle but $345 million might be an obstacle, might it not, that much money to be appropriated by the Congress for Panama?

Secretary COOPER. The notion of appropriation is not really relevant in the context which we were discussing with the Panamanians.

Senator ALLEN. They were demanding cash. Someone on the American team, whose identity is unknown to you, proposed the substitution of loans and guarantees.

Secretary COOPER. That is because we shifted the line of discourse from payments or repayments based on past claims, which is the framework in which the Panamanians put forward their case, to one of the future development of the Panamanian economy. Panama, while while being a developing country, is not one of the poorest developing countries. The case for truly concessional aid is not a strong one.

We have instruments of policy already existing in the United States to accomplish the kind of objective which we felt was important in Panama.

Incidentally, things such as Export-Import Bank credits also promote American exports.

Senator ALLEN. The Panamanians were talking about cash. That would have required an appropriation by the Congress. Your team suggested as an alternative a method that would not require appropriation by the Congress; is that correct?

Secretary COOPER. With the exception I have mentioned, the package we worked out in the end does not require appropriations by the U.S. Congress. It is fully within the framework of existing authority and our objectives.

Senator ALLEN. Do you know how much the annuity of Panama would be raised under the proposed treaty? Do you have an estimate of how much would go to Panama under the proposed treaty?

Secretary COOPER. Do you mean the total amount?

Senator Allen. Yes, annually.

Secretary Cooper. There are several different provisions. That is why I am hesitating. There are several different provisions under the treaty itself that involve payments to Panama that are not now being made. Some of those are quid pro quo for services which Panama will take over.

Senator Allen. That is the police service?

Secretary Cooper. Those are the local public services; that is correct.

In addition to that, the treaty provides for a royalty to Panama from tonnage going through the canal. It provides for the payment to Panama of $10 million plus an additional $10 million if the earnings of the Panama Canal warrant it.

That, obviously from the way it is structured, does depend, first, on the tonnage that goes through the canal and, second $10 million is paid. We believe that that sum will start out roughly in the neighborhood of $60 or $65 million a year. It will then grow through time if and as the tonnage of traffic through the canal grows.

$100 MILLION PER YEAR

Senator Allen. Wouldn't it average out pretty close to $100 million a year over 23 years of the treaty?

Secretary Cooper. I would not want to—I mean, that depends on what happens to traffic through the canal.

Senator Allen. Did Mr. Barletta come up with a somewhat larger estimate than you did?

Secretary Cooper. In terms of the initial receipts?

Senator Allen. No. I am talking about the payments over 23 years to Panama.

Secretary Cooper. It could. There are two elements which would tend to raise that figure from the initial figure of, say, $60 million to $65 million that I mentioned. The first is traffic through the canal. As that grows, the royalty part of that will grow in proportion to the traffic.

Senator Allen. The total is going to grow, too. Also the rate of the royalty per ton is indexed as is the payment for municipal services. Minister Barletta uses the figure $2.262 billion in 1977 dollars.

Secretary Cooper. Second, there is provision for adjustment of that corresponding to a modest measure of world inflation. So on both grounds there will be an increase in the dollar amount over time. I have not done the calculation to double check the figure you mention, but it could happen that by the year 2000 that number could be well in excess of $100 million per year.

Senator Allen. Did I understand you correctly to say that the President set the final terms of the American offer to Panama?

Secretary Cooper. That is not exceptional. As is general with any major policy decision, it is put to the President for his approval.

Senator Allen. This final package was one of the options. What was finally agreed upon was one of the options; is that correct?

Secretary Cooper. No. A series of options were discussed. What I do not actually remember was what was actually put to the President.

There was only one option which in its gross features was not in this package which was discussed extensively. That was essentially a lending arrangement, a somewhat complex lending arrangement, which would have provided development finance to Panama against a guaranteed fund, which would have provided out of canal revenues. In the end that proposal was rejected.

Senator **Allen**. But the President then accepted this option; is that correct?

Secretary **Cooper**. The President gave his approval to this general approach, yes.

AGREEMENT NOT AN AGREEMENT

Senator **Allen**. Mr. Hansell has testified that there is no binding agreement to carry out the terms of this unilateral agreement and that it will take an exchange of notes between countries. If Panama sent a note to the State Department saying, "We will accept these terms," would the State Department be bound to send a note stating that they were going to implement the carrying out of the accepted terms? In other words, is this an agreement or not an agreement?

Mr. **Hansell**. Senator Allen, I assume you are addressing that question to me. The answer is that it is at the moment a statement of our intention.

Senator **Allen**. In other words, it is like a letter of intent that is entered into by private companies. They will issue a letter of intent. Is that correct?

Mr. **Hansell**. I think it is more in the nature of an agreement to agree, but perhaps that is just another term for the same thing.

$345 MILLION TIED TO TREATY RATIFICATION

Senator **Allen**. Do you feel that the United States could honorably withdraw from this unilateral statement if Panama chose to accept it?

Mr. **Hansell**. I think the question is really the status of the treaty at that point. Although this is not a part of the treaty package, nevertheless, the timing of implementation of this program would depend a good deal on the timing of implementation of the treaties.

Senator **Allen**. Does that mean, then, that if the treaties are not approved by the Senate and if the Executive fails to get agreement by statute from Congress for the transfer of property—does that mean that the United States will not carry out this agreement? In other words, is the carrying out of this agreement contingent upon the approval of the treaties?

Mr. **Hansell**. It is not literally contingent upon approval of the treaties. We would continue to have, of course, an interest and a concern with the state of our relations with Panama and the Panamanian economy. One or more of these programs might for good, sufficient reason, even under those circumstances, seem to be a worthwhile undertaking on the part of the U.S. Government. It would depend upon the circumstances at the time.

Senator **Allen**. I understood Secretary Cooper to say that the United States was interested in furthering the economic development and stability of Panama and, therefore, it entered into these agreements. Now, from what you say, there seems to be some doubt about whether the United States would carry out that concern by going through with the agreements if the treaty is not approved.

Mr. **Hansell**. I think we would continue to have an interest in the Panamanian economy. What the circumstances might be at that time if those events were to occur, we obviously have not tried to envision.

Senator Allen. These treaties may not be approved, if they are ever approved, before 1979. Suppose Panama calls for the United States to deliver on this $345 million in loans and guarantees. Is it obligated to respond?

Mr. Hansell. I think we would have to look at that situation, Mr. Chairman, at the time any such request was received. To answer, we would be not obligated to respond; no.

Secretary Cooper. If I may add to that, Senator, I think that is the right answer. We would not be obligated to respond but as a matter of policy we might want to, depending on the circumstances and so forth. As I have said, we do have an interest in the functioning of the Panamanian economy. These are ongoing programs. We already have some Export-Import Bank lending in Panama now, for example.

We do not mean to suggest here that if none of this comes to pass we would not be doing any of these things. They are ongoing programs. The interest continues to be there.

Senator Allen. Suppose before action is taken by the Senate Mr. Torrijos says, "I need help now. I want you to implement this unilateral agreement." Would you do it?

Secretary Cooper. I think we would not make that decision until we were confronted with it. We find ourselves in any given year with a number of countries coming in saying, "You know, we are in bad shape. We would like a big, wealthy country like the United States which says it has an interest in our welfare to help out." Panama would surely be among those countries. Because of the canal, we have a special interest in Panama. If they were in serious trouble, we would want to take a very careful look at what we might do to mitigate that problem.

Senator Allen. You could do that in the absence of these agreements, couldn't you?

Secretary Cooper. That is correct.

Senator Allen. We do not need agreements to do those things.

Secretary Cooper. That is correct.

AWKWARD TO INCLUDE $345 MILLION IN TREATIES

Senator Allen. It would seem to me that these agreements are something in the nature of quid pro quo in connection with the approval of the treaties and, hence, should have been part of the treaties. What is your answer to that?

Secretary Cooper. I think it would have been awkward to make this kind of thing a part of the treaties because of the implication that if the treaty did not go forward these kinds of things could not go forward. That would have been unusual. These are things that are operating under existing statutory authority.

As I indicated, the Export-Import Bank already has loans, not on this scale, but it does have some loans to Panama on a modest scale. There are housing guarantees in Panama.

What we were trying to do here was to indicate in a concrete way our position on the proposition the Panamanians put to us in terms of their economic development objectives and so forth, that we were willing to help, and it was not just a question of a year-by-year basis.

Let's take a forward look. The timeframe of this is 5 years. Let's take a forward look. Here is a statement of intent on our part to indicate with some degree of concreteness——

Senator ALLEN. But it is intent that is subject to the approval of the treaties; is it not?

Secretary COOPER. It is intent that is subject to exchange of notes.

Senator ALLEN. Pardon me?

Mr. HANSELL. Mr. Cooper said that it is subject to exchange of notes, and that is right. It is not directly tied to the treaties.

Senator ALLEN. But before the the United States issues its note it is going to have to be satisfied in connection with approval of the treaties, is it not? Or else, as you said, you would take another look at it.

Mr. HANSELL. Senator, perhaps it is important to point out that we did, for very important reasons, want to have a separation between these arrangements and the treaties. All of these programs, of course, are provided for by separate statutory authorization. Each is subject to administration by an agency which conducts the particular program. It would have been from the standpoint of the United States undesirable to have made these programs a part of the rights and obligations that would flow from the treaties. Nevertheless, we did want to provide for the prospect of these programs and did so separately so that they would stand really on their own feet.

Senator ALLEN. For the record, what would our obligation be if Torrijos demanded that you implement this unilateral agreement now by an exchange of notes? In other words, what if he did not want to wait for the Senate to approve the treaty? What if he wants action now?

Mr. HANSELL. As Mr. Cooper has said, if that eventuality should occur, obviously the Government would have to look at it at that time and under those circumstances and decide what to do with it.

Senator ALLEN. I see. I wonder if Mr. Torrijos understands it that way.

Mr. HANSELL. I am sorry, Senator Allen, but I did not hear you.

Senator ALLEN. I said I wonder if Mr. Torrijos understands it that way or whether we might have to have another agreement as to what the unilateral agreement means.

Mr. HANSELL. I think they do understand that this is not, and it is not intended to be, a legally binding document.

Senator ALLEN. If it is not effective at this time if call is made for it, isn't it then tied in with the treaties?

Mr. HANSELL. Excuse me?

Senator ALLEN. Is is not then tied in with the treaties?

Mr. HANSELL. Not necessarily. It is a separate set of programs to be implemented in a manner that seems appropriate as time goes on.

PRESENT ANNUITY HYPOTHECATED

Senator ALLEN. This present annuity that Panama receives, that really does not go to Panama. It goes to New York banks, does it not? Is it not sent to them rather than to Panama?

Mr. HANSELL. The present annuity?

Senator ALLEN. Yes, sir.

Mr. HANSELL. Some part or perhaps all, I am not sure, has been assigned by Panama to service outstanding bonds issued by Panama.

Senator ALLEN. All right. Of the sum, whether it be $60 million or $70 million a year or closed to $100 million a year, that Panama would get under the treaties, what part will go to the New York banks to service Panama's $2.7 billion of indebtedness?

Mr. HANSELL. It is paid under the treaties to Panama. What arrangements the Panamanians will make to service their debt is, of course, a matter for them, not for the United States. The $2.7 billion figure, I think, is not the amount of their outstanding debt. Our information is that it is much less than that. However, whatever that debt is, it would be subject to whatever arrangements would be made to service the debts to the bondholders.

Senator ALLEN. The banks will be taken care of out of the $70 million-plus per year that Panama gets, will they not?

Mr. HANSELL. I beg your pardon? I did not hear the question.

Senator ALLEN. I said the banks will be taken care of, will they not, out of this payment that Panama will receive?

Mr. HANSELL. Presumably the Panamanians will make arrangements to pay their debts. How they will do that, we do not know.

Senator ALLEN. You do not think they would arrange to have this money run through them to the banks in the same manner as the present $2.3 million annuity?

Mr. HANSELL. That was accomplished by conventional assignment of proceeds. I suppose the same could be done with a part of these payments.

Senator ALLEN. You say the debt is not $2.7 billion. What figure is it then?

Secretary COOPER. Our figure on the public debt is about $1.1 billion. The whole question of debt is fraught with some ambiguity because it depends upon exactly what you count. The $2.7 billion figure which you mentioned does involve liabilities by residents of Panama with the rest of the world. Many of those liabilities are banking liabilities in the same sense that any bank owes liabilities to its depositors. Against those liabilities stand, on the other side of the balance sheet, substantial claims on the rest of the world.

Panama has tried over the past decade or so, with considerable success, to build up Panama as a regional banking center. Figures on Panama reflect that role.

The debt of Panama itself is closed to $1 billion. While that debt is much higher than it was a few years ago, Panama, like most of the other countries of the world, found itself caught after 1974 in the squeeze between higher oil prices and world recession and borrowed. On the kinds of comparisons we make with other countries, the Panamanian situation is not an alarming one. They have taken on a lot of debt, but we think that the debt continues to be manageable.

COMMITMENT OF INDEPENDENT GOVERNMENT CORPORATIONS

Senator ALLEN. How were the negotiators able to commit these various agencies of the U.S. Government to make these loans and to give these guarantees? For instance, the Export-Import Bank, how were they able to get them to commit to make $200 million in loans?

Secretary COOPER. The Ex-Im Bank is not committed to make those loans. It was made clear to the Panamanians that each individual loan or guarantee would have to stand on the usual criteria that Ex-Im Bank applies to all of its loans. There is a whole series of criteria that is applied.

It is similar with the housing guarantees. Those are made under normal programs.

What the letter amounts to is a statement of our willingness to entertain in the normal fashion requests for loans up to that amount over the 5-year period of time.

Senator ALLEN. That is the point I am making. What right would you negotiators have to say what the Export-Import Bank would do?

Secretary COOPER. We had discussions with the Export-Import Bank. The Export-Import Bank told us that this is what they thought they could reasonably do over this period of time.

Senator ALLEN. The Overseas Private Investment Corporation is a private concern, isn't it? Don't the have more private citizens than public citizens?

Secretary COOPER. OPIC is a semiautonomous Government corporation with its own board of directors. It does have on its board of directors a number of private citizens.

Senator ALLEN. They have a majority of private citizens, do they not?

Secretary COOPER. That is correct.

COMMITMENT NOT A COMMITMENT

Senator ALLEN. I am wondering how you are able to commit them.

Secretary COOPER. Again, to repeat, we are not committing them to do something. We are stating the willingness of them to do something subject to their own standards of approval.

Senator ALLEN. It seems we have had an agreement that is not an agreement and a commitment that is not a commitment.

Mr. HANSELL. I might point out, Senator, that the letter in question provides, for example, with respect to the OPIC program that whatever is done by OPIC would be subject to terms that would be agreed upon by OPIC. They would be, of course, in control of their own program.

Senator ALLEN. But still the negotiators suggested very strongly I assume, to the Panamanians that this would be forthcoming.

Secretary COOPER. It would be forthcoming subject to all the normal things.

What, in effect, we were saying, I suppose, was that there would be no political barriers to doing these kinds of loans or guarantees.

NO ASSURANCE THAT LOANS NEED NOT BE REPAID

Senator ALLEN. Some of these lending agencies, I guess private as well as public, make soft loans, loans where there is very little likelihood that they will be repaid. Was any assurance given that these loans might be in that category, soft loans, and that nobody would lose a lot of sleep if the money was not repaid?

Secretary COOPER. None whatever, no.

You use the term "soft loan" in a somewhat different sense from which it is used. It usually means concessional terms.

All of these operations are not on concessional terms. The Export-Import Bank charges an interest rate which covers its costs. The Housing Guarantee Authority charges market interest rates. There is no suggestion at all that these loans should not be repaid.

NO EFFORT TO GUARANTEE LOAN REPAYMENT

Senator Allen. Was any effort made to see that income that Panama receives from the canal might be pledged or hypothecated to the payment of this $345 million in loans and guarantees?

Secretary Cooper. No. The income that is provided for under the canal treaties is income that accrues to Panama. The individual loans and guarantees would be made on the basis of which such loans and guarantees are usually given. They do, under these programs, require a guarantee by the Government of Panama. In that sense they represent a potential claim, if something were to go wrong, on the entire revenue base of Panama. However, there is no effort to link them dollar for dollar in any direct way.

Mr. Hansell. May I point out, Mr. Chairman, that this does not preclude conventional arrangements being made in the future. Whatever arrangements, for example, OPIC or Eximbank may choose to make within its normal framework would still be available.

EFFECT ON PROGRAM FOR REDUCTION OF FOREIGN MILITARY SALES

Senator Allen. Would the $50 million in military credits run contrary to the President's desire to cut down on foreign military sales?

Secretary Cooper. The President's policy on foreign military sales stems from concern about the very substantial growth in arms sales which has taken place in the past several years, including U.S. participation in that, and a worry that we are feeding arms sales or arms races around the world.

At the same time, it seems to me we must continue to be a major supplier of arms. Therefore, what he was really addressing was drawing attention to that sharp rate of growth and arguing that we should cut it back.

In the case of Panama, we think that the Panamanian Forces are now small. They will be, under the treaties, taking over some land for which they had not had responsibility previously. We think that the very modest amounts provided here over a 10-year period are desirable in strengthening the local security forces in Panama. Both in terms of its location and in terms of its size, it seems to me that it does not cut against the general thrust of the President's policy in arms sales.

Senator Allen. That would take an act of Congress, I believe you stated; did you not?

Secretary Cooper. That is correct. Under existing arrangements foreign military sales guarantees require an appropriation of one-tenth of the amount covered, which is then sequestered in a guarantee fund.

Senator Allen. That would take action by the House as well as the Senate, would it not?

Secretary Cooper. Yes, as all appropriations do.

Senator Allen. The House might not look with great pleasure on that request inasmuch as it is my understanding that the administration does not plan to seek a statute from the Congress for the disposition of the property of the United States in the Canal Zone. Is that correct?

Secretary COOPER. We view these as not entirely linked issues. They are separable issues.

The commitment that we have to Panama is to make the administration's best efforts to provide these military sales credits. The Panamanians understand very well our legislative processes. They know—they have been told—in this case that our following through on that requires congressional appropriation. That is understood.

SLIPS BETWEEN THE CUP AND THE LIP

Senator ALLEN. If, as I understand that which has been stated before the committee, the administration does not plan to seek a statute authorizing the disposal of this property, is it not conceivable that the House might put an amendment to the Export-Import Bank authorization saying that this money should not be lent to Panamanian interests? Aren't you running into that?

Mr. HANSELL. That is always a possibility. Yes, that is always a possibility.

Senator ALLEN. So it looks as though there might be a number of slips between the cup and the lip here with regard to Panama getting these loans.

In the first place, you say you are going to take another look at the matter of this $345 million if the treaties are not approved and you have to look at it pretty closely if a request is made for these funds prior to the approval of the treaty. So it looks as though Panama does not have any ironclad agreement on this $345 million, does it not?

Mr. HANSELL. It does not have an ironclad agreement. That is correct, Senator.

MORAL COMMITMENT

Senator ALLEN. Do you feel there is a moral obligation on the part of the Government to see that they get this $345 million or its equivalent?

Mr. HANSELL. There certainly is a moral commitment to endeavor to bring these programs to fruition.

Senator HATCH. Could I interrupt you for a minute, Mr. Chairman?

If there is a moral commitment to bring these programs to fruition, then why is there not a moral commitment to recognize the Congress of the United States to whom you are going to have to go in order to do it later? Why not do it up front? If we have moral commitments, let's talk about morally committing ourselves to follow the Constitution.

Mr. HANSELL. I think there is a fundamental misunderstanding. The objective was not to avoid the Congress. The objective was to avoid cost to the taxpayer. The only way Congress can provide funds, of course, is by providing tax funds. The entire objective here was to find a means of assisting the Panamanians to boost their economy without cost to the U.S. taxpayer. Now that is an objective, it seems to me, that the executive branch shares with the Congress.

There was no decision and there was no effort to circumvent the Congress. Basically the program here was intended to save money.

If this goes well, there will never be a penny of taxpayer funds expended.

Senator HATCH. But there is a very good chance that it is not going to go well and that they will not be capable of making any of these payments.

Mr. HANSELL. Conceivably.

Senator HATCH. Very conceivably.

Mr. HANSELL. Each of these transactions, of course, will be looked at as a separate transaction and justified on its own terms before it is entered into.

CONGRESS MAY SAY NO

Senator HATCH. That comes back to my point. If we are going to bind the American taxpayer in advance of any appropriation, it would seem to me better to go to Congress and ask in the first place, so that we will not be put in the embarrassing position of having Congress turning it down later and then have us say to the Panamanians, "Well, we told you during the negotiations we might not be able to deliver," which is what Mr. Cooper seems to be saying.

Mr. HANSELL. I do not understand the question.

Mr. HATCH. I am talking about turning down the payments and guarantees that you are making here.

Secretary COOPER. Senator, with the exception of the military sales credits which do require appropriations, and which has been explained fully to the Panamanians, the other items are all under existing statutory authority. It would not be a question of putting the Congress in an embarrassing situation or the United States in an embarrassing situation.

Senator HATCH. Keep in mind that there is a lot more than just these loan credits and guarantees involved here.

Secretary COOPER. I am sorry but I thought that was what you were talking about.

Senator HATCH. I did not mean to interrupt the Chair for so much time. I will ask some more questions before we are through today.

CONCERN FOR TAXPAYERS

Senator ALLEN. Your concern, Secretary Cooper, for the taxpayer is commendable.

Senator HATCH. I want to echo that statement.

Senator ALLEN. That brings me to wonder about the fact that the Panama Canal Company owes the taxpayers, the U.S. Treasury, $319 million. In this juggling effort of transferring the canal to Panama and setting up a Panama Canal Commission to take over the operations of the canal, this debt of $319 million to the taxpayers is to be canceled. It is not to be carried forward to the new company. That concerns me deeply.

We are setting up this elaborate—I will not say "scheme"—we are setting up this elaborate plan to get $345 million to Panama through a system of loans and guarantees to save the taxpayers some money but yet the remainder of the cost of the canal, if I understand it, is $319 million. The Canal Company has been paying interest on that to the Treasury. It has been paying a little on the principal now and then. That is going to be wiped out. In effect, it is going to be given to Panama.

Where is the concern for the taxpayers exhibited there? Either one of you may respond.

Mr. Hansell. I am not familiar with the obligation that you mention of the canal company to the United States. There is an investment item, and I cannot speak to the amount, on the books. You say there is an obligation. Could you articulate that a little more explicitly? I am not familiar with it.

DEBT NOT A DEBT

Senator Allen. You are not familiar with the $319 million that the Canal Company has on its books as a debt to the U.S. Government?

Secretary Cooper. It is not a debt to the U.S. Government. It is what is left of the capital that the United States originally invested in the canal. It is not a debt. It is carried on the books of the Panama Canal Company and used for purposes of calculating interest payments to the United States.

Senator Allen. It seems strange that if it is not a debt since the canal was built they have paid $642 million in interest on this obligation, or whatever you want to call it. It must be something if they are paying interest on it. To this date, they have paid $642 million interest on the money. Why is that not a debt?

Secretary Cooper. Analogies are difficult and sometimes misleading, but it is not technically or legally a debt. If you want to make an analogy, it is more close to the equity which the shareholders of a corporation hold in that corporation. At the discretion of the board of directors over the years there have been returns of equity, one should call them, to the U.S. Government, but it is not a debt in the conventional sense.

Senator Allen. They paid $40 million on the principal and $642 million in interest. It is a charge against the revenues of the Canal Company, is it not?

Secretary Cooper. The repayments of equity, if I can put it that way, were done at the discretion of the board. I don't know the detailed history of when those repayments were made but I assume that they came in periods in which the canal was doing very well financially. Since it was operating under a stipulation that it should not make money, it returned this equity to the Treasury.

The interest payments that have been made to the U.S. Treasury arise from a concern that the canal toll structure should reflect the full longrun costs of the canal. It was deliberately built in there so that the tolls should reflect a return to capital in that sense.

Senator Allen. Just last year the U.S. Treasury—the taxpayers, if you please—did receive $16 million in interest on this equity investment.

Secretary Cooper. That is correct.

PROGRESS AT LAST

Senator Allen. That would be lost to the Treasury, would it not? We have no further claim for repaid capital investment, would we?

Secretary Cooper. At the termination of the treaty that would be lost to the Treasury; yes.

Senator **Allen**. Now we are getting somewhere. In other words, if it is called a debt or unpaid equity investment, it is still money that in the ordinary course of events under the present treaty would ultimately come to the U.S. Treasury with interest. Is that not correct?

Secretary **Cooper**. No; that is not. You were all right up to the last part.

What comes to the Treasury is denominated "interest." There is no provision for a repayment of that capital item in the balance sheet.

PRINCIPAL NOT PRINCIPAL

Senator **Allen**. Yet the Company has been doing it. The Company has paid back $40 million in principal into the U.S. Treasury.

Secretary **Cooper**. At the discretion of the board of the Panama Canal Company, repayments of capital can be made. As I indicated, I do not know the history of those particular transactions but there must have been some time in the past in which the revenues of the canal were such that the Canal Company felt that rather than reduce the tolls, it would repay part of the original investment to the U.S. Treasury.

Senator **Allen**. The board is controlled by the U.S. Government. I guess the discretion would be the discretion of the U.S. Government, would it not?

Secretary **Cooper**. Officers of the U.S. Government, that is correct. There have been, also, as in the case of OPIC, nongovernmental members on the board.

INTEREST NOT INTEREST

Senator **Allen**. Yes, but that policy seems to have gone out the window with the latest round of appointments. How much is the interest rate on this unpaid equity?

Secretary **Cooper**. About 5 percent a year, I am told.

Senator **Allen**. About 5 percent a year.

It looks as though we are just splitting hairs when we say that that is not a debt or an obligation. It is something on which interest is being paid. It is unrepaid money that the United States has put into the canal, is it not?

Secretary **Cooper**. It would be more correct to call that interest—although it is called interest—dividends.

Senator **Allen**. That is what you say but it is called interest, is it not?

Secretary **Cooper**. The reason we avoid the term "dividends" is that the Canal Company is not supposed to make a profit in a conventional sense and is charged by statute not to make a profit; yet there is an enormous amount of capital tied up in the canal.

Senator **Allen**. Is there anything wrong with the U.S. Government getting back its original investment in the canal?

Mr. **Hansell**. Senator, may I make a comment that I think perhaps would be helpful with respect to this?

The arrangements that you are discussing with respect to repayment and the operations of the Canal Commission will be a function more of the implementing legislation than of the treaty. These matters of operation of the new Canal Commission and the payments that it would be expected to make and so forth will be before the Congress in connection with its consideration of implementing legislation. They do not flow, necessarily, from the treaties at all. These issues will have to be addressed in that context.

Senator ALLEN. Under the treaties I understood Secretary Cooper to say that this money would be wiped out. This unpaid equity would be wiped out.

Mr. HANSELL. On the question of what payments are made by the Canal Commission to the United States, the program under the treaties would contemplate the creation of the Canal Commission, although, again, the implementing legislation would actually determine that more than the treaties themselves.

Senator ALLEN. It would not be carried as a debt by the Commission, would it, by the new Commission?

Mr. HANSELL. We would not expect that, although the Commission, of course, will have to speak to that. The Commission will have to make that decision ultimately itself as to how it will set up its books.

Senator ALLEN. You do not anticipate that they would voluntarily take on a $319 million obligation that the treaties relieved them of, do you?

Mr. HANSELL. The treaties do not explicitly relieve them of it, Senator.

Senator ALLEN. They do not carry it forward either, do they?

Mr. HANSELL. No, sir.

What I am saying is that those issues are not directly a function of the treaty as much as they are an implementation of the treaty.

Senator ALLEN. I will disagree on that. We are making a disposition of the canal. We ought to wrap it up in one package, it would seem to me. Three hundred and nineteen million dollars is a large enough item that these treaties ought to be amended to make provision for the $319 million. I think the taxpayer has that investment there. Whether it is an unpaid investment or a debt, that is splitting hairs.

Mr. HANSELL. Do keep in mind that the property transfers and so forth do not all take place at the moment the treaties come into effect. You are familiar with the way in which those are phased out, I know.

My only point is that some of these issues really are not directly functions of the treaty but of the implementation of the treaty.

Secretary COOPER. Senator, if I may say something on that, I cannot pretend to know the history all the way back to 1902 in detail, but my impression is that it was never envisaged that the U.S. investment in the canal should be paid back. It has never been envisaged that it should be paid back.

Senator ALLEN. Nor was it envisaged that the assets of the Company would be given away. But what about the payments on the principal then?

Secretary COOPER. The United States interest was in constructing the canal which we thought was going to serve both our economic and our security interests. That canal continues to exist now.

The whole financial arrangement surrounding the canal was reexamined by Congress in the early 1950's, which is now over 25 years ago. At that time, if there had been a desire on the part of Congress that the original investment of the United States in the canal be repaid, it would, I think, have been put in legislation. On the contrary, no regular provision was made for the repayment of the investment. Provision was made for continuing interest payments, as they are called, on it, and at the election of the Board, repayment. However, it was not built into the cost structure of the canal that the investment be repaid.

I think it is fair to say that the underlying assumption there was that the asset itself served U.S. interests. It was not necessary to repay the investment as such.

The provision for possible repayment was put in there for completeness but not as part of the builtin cost structure of the canal.

Senator ALLEN. But the taxpayer will be losing this $16 million in interest that is now being paid by the Panama Canal Company and will also lose title to the assets of the Company.

Secretary COOPER. That is correct.

Senator ALLEN. It shifts around so that the United States gets nothing and a Panama gets $60, $70, or $100 million, depending on the amount of the revenue. Is that correct?

Secretary COOPER. I have not seen any figures that suggest a number as high as $100 million in the near future. It might come at some later time, depending on how revenues develop.

Our estimate is in the order of $60 to $65 million, as I said earlier, in terms of revenue accruing to Panama.

EQUITY NOT EQUITY

Senator ALLEN. Do you think it would be inequitable for the American taxpayer to continue to draw interest on this unpaid equity investment?

Secretary COOPER. Equity, like beauty, is in the eyes of the beholder.

Senator ALLEN. What does that mean?

Secretary COOPER. It means that it is one of these words which does not have a precise meaning.

Senator ALLEN. Would it be improper, then, for the U.S. taxpayer to continue to get this $16 million?

Secretary COOPER. I would not want to call it improper, no. We have been getting the $16 million.

Senator ALLEN. Would it be fair to the American taxpayer to deprive him of this $16 million a year in income?

Secretary COOPER. Again, fair is a word like equitable, which is in the eyes of the beholder. The Panamanians would argue, "Is it fair for you to have all of the benefits—the economic and the security benefits of this great resource, the canal, which is right across the middle of our country and pay us only $2.3 million a year for it?"

Senator ALLEN. Do you think that the average American taxpayer would approve of $16 million in income being taken away from the American taxpayers?

Secretary COOPER. Do you think the American taxpayer would approve——

Senator HATCH. Why don't you answer the Senator's questions instead of asking questions?

Secretary COOPER. I am not a pollster, Senator. I cannot comment on what the American taxpayer would approve.

Senator HATCH. How do you feel?

Secretary COOPER. My own view is that within given revenue constraints, the division of revenues, if one can put it that way, $16 million to the United States and $2 million to Panama, has not been appropriate.

Senator ALLEN. You think what?

Secretary COOPER. Senator Hatch asked my own personal opinion. My own personal opinion is that the division of such revenues as there are to be distributed, $16 million to the American taxpayer and $2 million to the Panamanian taxpayer, has not been a fair one. That is a very subjective judgment.

Senator ALLEN. What about the American taxpayer getting nothing and Panama getting $60 million a year? Is that fair?

Mr. HANSELL. Senator, may I interrupt to say that——

Senator ALLEN. No. Let's allow him to answer.

Mr. HANSELL [continuing]. That is not necessarily going to occur. This is an issue as to which the Congress will speak.

Senator HATCH. They think it is going to occur. That is what we were told when we were down there.

Senator ALLEN. Congress cannot retrieve the $16 million once these treaties are executed. We cannot do it.

Mr. HANSELL. The question of how the canal will operate, the tolls that will be charged, the payments that will be made to the United States—these are issues of treaty implementation, a matter of income and expense of the new Canal Commission. These do not automatically and necessarily flow from the terms of the treaty. I think we should be clear about that because there will be before the Congress the implementing legislation. There will be before the new Commission judgments, obviously, as to tolls, income, expenses, and the issue of payments to the United States, if any. Whether there would be any interest or profit or equity to be paid, assuming there was any income to do it, will be an issue that would be confronted hereafter.

ARTICLE XIII FORBIDS LIENS ON ASSETS

Senator ALLEN. We are spelling out in the treaties the methods of arriving at what Panama shall get; moreover, article XIII of the proposed Panama Canal Treaty says that all canal assets must be turned over to Panama free from any liens or encumbrances; yet you say that what the United States will get will have to depend on congressional action taken. I do not believe Mr. Torrijos, once treaties are executed and once the treaties are approved by the Senate and the canal is turned over to him, would pay any attention to an act of the U.S. Congress giving the United States some portion.

Why not decide now what the United States is going to get out of the operation and specify that as a part of the treaties?

Mr. HANSELL. Sir, first of all, may I clarify this: the canal is not turned over to him as a result of the ratification of the treaties. For a period of 23 years, as you know, it continues to be operated——

Senator ALLEN. There is the matter of at least $70 million income, and title to the assets would pass to Panama on day 1—we would have nothing but a management contract, no more; not even the right to share in any profit.

Mr. HANSELL. The Panamanian income, of course, is derived from revenues.

Senator ALLEN. But is our $16 million derived from revenues?

Mr. HANSELL. Well, it may well be paid if there is a surplus.

Senator ALLEN. There is nothing in the treaty about it.

Mr. HANSELL. We would not negotiate that with the Panamanians, sir. We have negotiated with the Panamanians over what they would receive but what the Canal Commission does with any excess of revenue that it receives after it has discharged its obligations and commitments is a matter for the Congress and Commission to determine. That would not be a matter that would be negotiated in the Treaty.

THE UNITED STATES—HAT IN HAND

Senator ALLEN. This seems a little one sided to say that Panama is going to get a definite share of the income and the United States, after the treaties are approved, has to go hat in hand to the Commission and ask for part of the action.

Mr. HANSELL. No, sir. During this period the Canal Commission will be, if you will, using someone's property and has agreed to pay what the Attorney General on one occasion referred to as the equivalent of rent. There is nothing unusual about committing to pay for the use of property.

Senator ALLEN. The property being the canal?

Mr. HANSELL. Yes, sir, the canal that the Commission will be operating.

A QUESTION OF OWNERSHIP

Senator ALLEN. I thought the State Department contends that the canal is not the property of the United States.

Mr. HANSELL. Of course, I did not say anything inconsistent with that.

Senator ALLEN. You said the property that would be used——

Mr. HANSELL. I am saying that this is the equivalent, substantial equivalent, as it was referred to by the Attorney General at one point—and I think it was a pretty good analogy—these charges that are payable to Panama can be looked on as the rent payable for the use of the property.

In any event, if the revenue from the tolls is such that all of the costs and expenses can be paid and there is a surplus, then there is nothing to preclude, by legislation or other argument, the Commission from making payment. There is nothing to preclude it from making a payment.

Senator ALLEN. Why should the United States have to get funds out of surplus when Panama gets its off the top?

Mr. HANSELL. It is a question of who controls the property, I guess.

Senator ALLEN. Sir?

NOT AN UNUSUAL ARRANGEMENT

Mr. HANSELL. I say it is a matter of the contractual arrangements with respect to the treaty and with respect to the property. I am saying it is not an unusual arrangement.

Senator ALLEN. The point I am making is that interest payments are now being made every year. We forgo that. We surrender title to the assets. We satisfy the mortgage and promise no encumbrances. We give Panama $70 million a year out of the revenue, and the United States has to go and try to work something out with the Commission. Somehow these arrangements strike me as unusual—if not bizarre.

Mr. HANSELL. In the past, Senator, I think whatever payments have been made to the Treasury have come after payment of all other expenses. There have been years, I believe, in which that payment has not been made to the Treasury. Others would have to speak to that.

Secretary COOPER. That is correct.

Mr. HANSELL. Our payments have always been after discharge of other obligations of the Canal Company. This is no change.

Senator ALLEN. Yes, but we have been getting it. It has been recognized as an obligation payable at a specified rate figured against principal.

Mr. HANSELL. Not regularly.

Senator ALLEN. $642 million worth. That is pretty regular.

Mr. HANSELL. All I am saying is that the uncertainty in the future as a legal matter is no different from the uncertainty of the past. The numbers are different.

Secretary COOPER. The interest is payable to the U.S. Treasury, if available. There have been times in the past in which the Panama Canal Company has skipped its interest payments.

Senator ALLEN. As I say, though, $642 million has been made available so it must have been pretty regular at $16 million a year. I am also advised that no payment has been missed since 1951. Except in 1976, and in the transition quarter, that interest for those periods has already been partially paid and will be paid in full during 1978.

I have more questions. As a matter of fact, I have several prepared questions, and I have not gotten to any of them yet. These questions were merely ad hoc that I have asked.

I would like to submit these questions for respone for the record, please.

Mr. HANSELL. Yes; we will be pleased to respond.[1]

Senator ALLEN. Senator Hatch and I divided up the time. That is the reason he has not been participating in the questioning. It was agreed that I would have the first hour and now Senator Hatch will have the second hour. So you gentlemen will endure further questioning.

FOOTING THE BILL

Senator HATCH. You have been through the rough time; now you can go through the easy time. [Laughter.]

Let me ask you this: Pursuant to the treaties and the accompanying documents, who pays for our costs of management of the canal?

Secretary COOPER. I am sorry but I do not quite understand the question.

Senator HATCH. Who is going to pay for our cost of management—our employees, our members of the Commission, et cetera?

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[1] See page 467.

Secretary COOPER. The Panama Canal Company now and, when this goes through, then the successor company pays all of the costs associated with it, including what you were referring to as "our costs." They come out of the canal revenues.

Senator HATCH. In other words, all these costs have to come out of the canal revenues in addition to the $70 million that we feel can come out of tolls to be made to the Panamanians.

Secretary COOPER. That is correct. The canal is supposed to be run as a fincially self-supporting operation.

Senator HATCH. So what the State Department is saying is that the U.S. taxpayer will not be charged one iota, not one dime, for the operation of the Panama Canal?

Secretary COOPER. That is the assumption.

PENSION COSTS

Senator HATCH. Who is going to pay for the pension costs of the retiring laborers who have been asked to retire early in their careers to come back to the United States presumably? Is the United States going to pay for that or are the canal tolls going to pay for that?

Mr. HANSELL. Pensions that employees are entitled to under existing legislation through the Civil Service Commission——

Senator HATCH. Don't tell us that because there is not existing pension legislation. It may be the basis for making special considerations for these people which will make additional, it seems to me, statutory action; right?

Mr. HANSELL. Correct.

Senator HATCH. That means that we are going to have to make appropriations for that; is that correct?

Mr. HANSELL. If there are retirements.

Senator HATCH. We have been told there are going to be retirements. There are going to be early retirements and there are going to be people who will be given special consideration as a result of their lack of desire to stay down there under a canal with our jurisdiction completely given up, both civilly and criminally, within 3 years after the ratification.

Mr. HANSELL. I guess I have lost the question.

Senator HATCH. I am saying there will be special pension considerations not presently written in the law that we will have to fund here in the United States of America for those who would be retiring early not pursuant to existing pension law.

Mr. HANSELL. If there are those benefits and if there are retirements under them, those would be Civil Service Commission obligations.

Senator HATCH. You are saying that we would have to have special appropriations to take care of those inasmuch as they may not fit within the present civil service pension requirements.

Mr. HANSELL. I am not sure I would agree that they would be special appropriations. The aggregate pension obligations of the Civil Service Commission, if it is the source of payment of pensions—as I understand it is—would have to be paid. That would be a function, of course, of all retirement commitments. It might increase. I am not suggesting that it would not. I don't know, but I am saying you can only calculate all of its pension commitments and the amount needed to service them.

POLICE AND GARBAGE

Senator HATCH. Who is going to pay the $10 million for the police protection and garbage collection about which we have heard?

Mr. HANSELL. The Panama Commission.

Senator HATCH. The successor Commission?

Mr. HANSELL. Yes, sir.

Senator HATCH. That also has to come from the tolls?

Mr. HANSELL. Yes, sir.

Senator HATCH. That is part of the approximately $70 million that we have been talking about?

Mr. HANSELL. I believe so.

Secretary COOPER. I said $60 to $65 million. That does not include that $10 million.

Senator HATCH. That would be on top of that? That is something that has to be paid.

Secretary COOPER. That is something that has to be paid but those are services that are now rendered.

Senator HATCH. Do we pay that or do the tolls pay for that?

Secretary COOPER. What is happening under the proposed arrangement is that certain services which are now rendered directly by the Panama Canal Company or the Canal Zone Government will be the responsibility of the Panamanians. In recognition of that, there will be a payment from Canal Company revenues.

Senator HATCH. Which will come from tolls?

Secretary COOPER. Yes; which will come from tolls. They will be paid to Panama for these services.

At the same time, however, certain services which are now defrayed out of Canal Co. revenues will no longer have to be paid by the Canal Co.

Our reckoning is that once this switch has actually been completed there will actually be a savings of money on that because the cost of rendering those services now exceeds the $10 million payment which will be made to Panama for rendering those services.

WHO PAYS IF NO REVENUES

Senator HATCH. Mr. Hansell, what happens if all of a sudden the Panamanians say that they just cannot afford to operate the canal or for any reason they shut down the canal? What do the treaties provide the United States may do in that situation?

Mr. HANSELL. As you know, the neutrality treaty contemplates that the canal after the year 2000—but prior to the year 2000, of course, it is a matter of our——

Senator HATCH. Let's say after we turn over criminal and civil jurisdiction to the Panamanians, which I understand will occur 36 months after ratification.

Mr. HANSELL. Thirty months after effectiveness.

Senator HATCH. Thirty months after effectiveness what happens if the Panamanians say, "We just do not want to operate the canal anymore. We are going to shut it down because it is just not a winning proposition. We cannot get the $75 million—that is, $60 to $65 million plus the $10 million, plus paying for the American costs of operating the canal, plus all the costs of assimilation, plus a number of other costs"?

Mr. HANSELL. The operation of the canal until the year 2000 is our responsibility. The Panamanians would not be in a positon to say that. When I say "our," it would be the Canal Commission.

Senator HATCH. Who is going to pay if Panama all of a sudden decides that the tolls are not good enough to warrant contining to operate it?

Mr. HANSELL. They would not be making that judgment.

NEUTRALITY DOES NOT IMPLY RIGHT TO KEEP CANAL IN OPERATION

Senator HATCH. Let's say the year 2000. What if the operation is no longer profitable? Where are we then?

Mr. HANSELL. Where are we? At that point we have the neutrality treaty which commits both countries to maintain the neutrality of the canal, which of course contemplates that it would be open and accessible.

Senator HATCH. Yes; but I do not see that we are anywhere given the right to intervene to keep the canal open. Would we then have a right to come back in and open it up and operate it ourselves for the benefit of our Nation and all the other nations of the world?

Mr. HANSELL. We have to keep the canal open under the neutrality treaty, but, frankly, we would anticipate that the Panamanians by all logic and good sense would be discussing that issue with us because it is an important source, of course, of——

ANALOGY TO RUSSIAN SUBSIDY TO CUBA

Senator HATCH. Why would they when some say that 20 of their top leaders are Communists and that they have close ties with Cuba? We had the same argument when we said that Cuba was so interdependent upon the United States for commerce, trade, and so forth, that it could not exist without the United States.

What if Russia pours the same $1 billion-plus into Panama and says, "Shut it down"? What are we going to do?

Mr. HANSELL. That is so extraordinary.

Senator HATCH. It is? That is what they said about Cuba, didn't they?

Mr. HANSELL. I cannot speak to that.

Senator HATCH. Didn't they say that Castro was a "social, agrarian reformer" and that "he loves the United States"?

Mr. HANSELL. If we had to fall back on our rights under the neutrality treaty—all I am saying is that you pose what is an extraordinarily unlikely set of circumstances.

Senator HATCH. I think it is extraordinarily likely.

Mr. HANSELL. If I can finish my sentence, Senator, I would point out to you that this is such an important source of revenue to them——

Senator HATCH. What if they can get $1.6 billion, like Cuba did, which is more than they will make from the canal, to shut it down? Which would be more important to them—the $1.6 billion on the approximately $70 million, assuming that the canal can pay for that?

Mr. HANSELL. I do not understand the source of the $1.6 billion.

Senator HATCH. I understand it because I understand that amount is about what Russia puts into Cuba annually right now.

Mr. HANSELL. In any event——

Senator HATCH. Weren't the same arguments given then?

Mr. HANSELL. If all of these circumstances that you hypothetically——

Senator HATCH. Let's just say that Russia says, "Hey, it would be inexpensive for us, since there are only four major straits in the world—and Panama being one of the most important and certainly the most important for the United States—it would be very beneficial for us to shut down the canal after these treaties are operating." Let's say they could pay $2 billion to Panama, or $1 billion, or whatever it is. The precise figure is insignificant but it is considerably more than the $70 million the Panamanians would be able to get from the canal tolls.

Why is that so illogical since Russia does it now in Cuba?

Mr. HANSELL. I don't want to get into a discussion with you about what happened in Cuba. My understanding of the facts would be different.

Senator HATCH. We said the same arguments then.

Mr. HANSELL. We did not have a neutrality treaty that would govern the circumstances that whereas we would here. If in the end we had to turn to our rights under the neutrality treaty—and I think that that is the hypothesis you are creating—we would have to turn to our rights.

Senator HATCH. Who is going to pay for that?

Mr. HANSELL. In terms of who would operate the canal——

Senator HATCH. If we would have to assert our rights under the neutrality treaty, who is going to pay for it?

Mr. HANSELL. There would be revenues in the form of tolls, presumably, and there would be expenses.

Senator HATCH. Why don't you just answer that the United States of America taxpayers are going to pay for it?

Mr. HANSELL. Because I could not begin to conceive how all that would take place. At this stage it is such a remote hypothetical, Senator——

RUSSIANS IN PANAMA

Senator HATCH. It is not remote at all. We know the Russians were there in Panama between October 11 and 29, negotiating to go ahead with a heavy-duty equipment plant. Other matters were discussed. What is so unreasonable about their taking an economic advantage of the United States by shutting down the canal and give Panama more money than Panama could make off of the canal? If the price were right, Panama would have little trouble finding an excuse. You do not think that is logical?

Mr. HANSELL. We are talking about 23 years hence.

Senator HATCH. I am talking about after we lose effective jurisdiction over the zone.

Mr. HANSELL. Twenty-three years hence is the time that operation of the canal is relinquished to the Panamanians. Until then, by explicit provision in the treaty, it is our obligation and our responsibility to operate and maintain the canal.

Senator HATCH. An obligation but not our right and on a 5-to-4 Commission basis.

Let me throw out a hypothetical. There are five Americans and four Panamanians, let's say. What if one of our Americans says, "We don't think it is making enough money to pay the Panamanians what they need to have, and I am going to vote with them to shut down the canal"? What do we do then? He would never be able to come back to the United States, but presumably he could retire in Switzerland.

Mr. HANSELL. These are Presidential appointees. The President has the same power over these appointees as he does over——

Senator HATCH. And you are sure that the President is going to appoint people who would always be committed to keeping that canal open for the United States?

Mr. HANSELL. In addition, Senator, I keep coming back to this because it seems not to have come through. Congress is going to have a very substantial say in how all this is going to evolve.

Senator HATCH. Well, I assume there is no chance the Congress would be so stupid as to permit the President to make these appointments without Senate confirmation, but what if we make a mistake and put five people in there, one of whom votes with the Panamanians and shuts the canal down because economically it cannot be run at a profit?

Mr. HANSELL. Congress will have available to it the opportunity to change the legislation.

Senator HATCH. Will we? The Board's membership is specified by the proposed treaties.

Mr. HANSELL. Yes. The Canal Commission will be created by legislation that will be enacted by this Congress.

NO OPPORTUNITY TO RESTRUCTURE COMMISSION

Senator HATCH. If we are bound by these treaties, I don't see how we can vary the treaties with subsequent legislation. The structure of the Commission is fixed.

Mr. HANSELL. I think if you look carefully at the treaties——

Senator HATCH. I have.

Mr. HANSELL. I know you have. If you think through, as I have, how they are to be implemented by legislation, you will come to the conclusion that matters such as these will be a function basically of the legislative action of this Congress.

Senator HATCH. I disagree with you on that, but let's take the easier question.

By the year 2000 assume that we turn over all control to the Panamanians and at that point Russia says, "We want you to shut the Canal down. We are going to give you $1½ billion a year, like we are giving to our dead friends in Cuba." You think that is remote, but I think that is very probable. I am even extending it through the 22-year term so that we can understand the proposition more easily.

Let's assume Panama shuts it down. The price was right. Then we are limited to asserting the rights you say we have under the Neutrality Treaty and coming in and paying for all of this ourselves; is that right?

Mr. HANSELL. No, I don't think we are limited. There is a whole spectrum, really, of remedies and relief possibilities that would be available to us. When you structure your hypothetical, of course, you exclude all possibilities that are the most likely. One of those is that the Panamanians would come to us because the operation of the canal is important.

Senator HATCH. Would we then give them the $\$1\frac{1}{2}$ billion rather than have Russia do it?

Mr. HANSELL. According to your hypothetical, as I say, all the terms make impossible any of the many solutions to that kind of problem that as a practical matter would occur. All I can say to you is that I cannot envision that.

Senator HATCH. Why didn't that occur in Cuba?

Mr. HANSELL. I cannot speak to the Cuban situation.

SOVIET FUNDS THROUGH CUBA

Senator HATCH. Let me go to other questions.

I agree that there are a lot of ambiguities and difficulties with these treaties. I would just point out one of them.

I believe it is going to be a very simple thing for them to shut down the Canal after we lose civil and criminal jurisdiction. I think it is a very high probability. I think there will be much more ease in shutting down the canal after we turn over criminal and civil jurisdiction and after we cut our military bases from 14 down to 4 than there would be if we stayed there.

Mr. HANSELL. Why would they do that? This is the source of millions of dollars of revenue.

Senator HATCH. What incentive did Fidel Castro have to cut off his nose to spite his face?

Mr. HANSELL. You are suggesting that this $1.6 billion arrangement is going to be made by the Russians as soon as the civil and criminal jurisdiction is turned over?

Senator HATCH. No; I think they will be smarter than that. I presume it will come through Cuba.

The point is that we said the same thing about that great agrarian reformer, Castro. He was bound to be good to us because he was dependent on us. Now we are sitting here with an alien enemy 90 miles off our coast. Admittedly, Panama will at least be more than 90 miles.

UNDERSTANDING A DISTINCTION

Mr. HANSELL. Our exposure in that respect is no less today than it would be under the new treaties. If you think that is going to occur, it is going to occur under the existing Treaty as it is under the new treaty. There is no difference in that respect from the existing treaty which, after all, provides for our operation of the canal.

Senator HATCH. Yes, there is a major difference because right now we control it militarily and we control all aspects of it. Surely you understand that.

Mr. HANSELL. The distinction in terms of the situation you put really is no different. The Russians have $1.6 billion, I suppose, under the existing Treaty——

Senator HATCH. They can't shut it down as long as we are there. We would not allow it as long as we were there. If we turn it all over, it seems to me that it would be very, very difficult for us to prevent it at that point, just like we are unable to prevent Soviet actions in Cuba.

HIGH PRODUCTION COST IN PANAMA

Let me ask Mr. Cooper several questions.

According to the American Embassy in Panama—and I refer to the widely distributed note of October 26, 1976, which was reprinted in the Congressional Record—the chronic economic recession in Panama is caused primarily by Panama's high cost of production which has made Panama basically uncompetitive with the world market.

My question is this: In what respect, if any, will these various economic assistance programs alleviate the basic economic problems in Panama? In what way will they help to reduce the high cost of production which presently causes Panama to be uncompetitive?

Secretary COOPER. Senator, I cannot speak directly to the allegation that Panama has a high cost of production relative to other countries.

Senator HATCH. According to a note sent by the American Embassy in Panama to the State Department, October 26, 1976, there were listed a number of economic problems explaining Panama's current recession, chief among these was the chronically high cost of production throughout the Panamanian economy.

Secretary COOPER. Let me comment on that. The interesting thing about that is Panama is not distinctive in its current economic recession. It is a set of problems that sits on most countries of the world. You simply cannot argue that the problems in most countries of the world today are due to their cost of production. There is a much more general phenomenon, which is very high oil prices which continue to be a burden on countries that do not produce oil and have to pay for it and, second, the global recession. We in this country are in the lead of coming out of it. If you go to Europe or many developing countries, you find the kind of phenomenon that you find in Panama.

Indeed, my impressions are that Panama has not been as hard hit as a number of other countries. Unemployment, for example, if I recall it correctly, in Panama is about 6 or 7 percent, which is not that different from in the United States, whereas in a number of developing countries you have 15, 20, or even 25 percent unemployment.

Without knowing the details, I would be inclined to be skeptical of an argument that said that Panama's current economic malaise is due to its high cost of production as opposed to the general world economic situation, which, as I say, affects many, many countries besides Panama.

Senator HATCH. This memo from the State Department says that:

> Panama's basic weakness is that Panama is not competitive on the world market. This is the result chiefly of high cost production in both agriculture and industry. A lack of natural resources exacerbates the problem.
>
> Agriculture. Farm labor costs are high—$3 a day. This is double the rate anywhere in Central America.

Secretary COOPER. Wait a minute. Our wage costs are many factors higher than that, but we do not say that we are uncompetitive. You have to set wage costs against productivity. It is true that Panamanian wages are higher than in Honduras?

Senator HATCH. They are higher than anywhere else.

Secretary COOPER. They are higher than Guatemala. However, it is also true that Panama has on the average a better educated population, a better trained population, and so forth. You have to set those higher wages costs against productivity.

Second, Panama, much more than the other Central American countries, relies for its earnings on services. As came up earlier in the conversation, it has an extensive international banking community there which the other countries do not have.

Just because Panama cannot compete with, say, Honduras in product *x* is not the same as saying Panama cannot earn its way. It is oriented much more toward trade in part because of the canal, toward services to the canal itself, and toward bank——

MORE FACTS

Senator HATCH. Let me give you some more facts because you apparently have not read the same memo that I have.

Secretary COOPER. I am sure I have not.

Senator HATCH. Your remarks contradict those of your own Department. The note states:

> Industry. Panama's manufacturing industry has little export or overall growth potential because of high production costs. A lack of natural resources exacerbates the problem.
>
> Minimum wages and the general wage and benefit structure in Panama are the highest in Central America and among the highest in all of Latin America.
>
> Miscellaneous considerations. Overall economic growth is near zero for 1976. Panama's problem is structural and is not caused by worldwide economic trends or world trade.
>
> The country continues to decline economically. Private investment reached a peak in 1971. Growth in manufacturing began to fall off in 1971. There has been almost no increase in the volume of manufactured exports since then.
>
> Expansion of construction activity began slowing down in 1972 and has actually been declining since 1974. Imposition of rent controls in 1973 brought private investment in low cost housing to a standstill.
>
> At the same time, growth of public services has remained near 8 percent annually through 1974.

The conclusions basically were:

No. 1, "Panama's high wages, subsidies, and consumer imports, together with a moderate tax burden and little public savings, has created an artificial high standard of living which no longer appears to be supportable by Panama's inefficient domestic production."

No. 2, "Increasing amounts of foreign money continue to pour into Panama. This has permitted Panama to defer grappling with the core problem of low productivity until a later time—when the problem has worsened. Much of the capital inflow of the past 3 years, instead of going to the heart of the problem, has simply aggravated Panama's economic sickness by increasing its debt service burden without enhancing overall productivity."

No. 3, "The types of actions that are necessary in order to improve Panama's high cost structure run headlong into Torrijos' 'revolution' in that they would require reduced social and economic benefits now being granted to the urban and rural working classes over the past 8 years."

No. 4, "Panama's best economic prospects," according to the memo, "lie in the development of its potential as a hub for servicing international commerce, especially cargo handling. It is thought that Panamanian access to relevant Canal Zone sites would help Panama develop an intrastructure on which growth of various transport, storage, and other commercial services depend. This may be a principal motive for transferring the zone to Panama."

There are additionally the many statements made by Nicholas Barletta, Panamanian Minister of Economics, which indicate that debt service is extremely high, almost 40 percent of revenues, and that public debt is well over $1 billion.

Secretary COOPER. That is not debt service but the debt.

Senator HATCH. Yes; present annual debt service would equal roughly the revenue from these proposed treaties. But putting that aside, did you or any other negotiator propose to Panama that it make substantial changes in its economic policy in order to receive U.S. economic assistance? These economic policies they have now are not working. They have gone from $169 million in 1969 to $1.7 billion in public debt in 1977. At least that is the information that we have from the Library of Congress. That is in less than 10 years.

Mr. COOPER. I am not sure what the question is. I cannot comment on the memo which I have not read. On the basis of what you have said about it, though, one thing strikes me. It says that Panama has no natural resources. In fact, they have the largest copper find anywhere in years.

Senator HATCH. They have great natural resources but they do not know how to develop them. Their system has not developed them.

Mr. COOPER. I understood them to say that they have no natural resources. Maybe I misunderstood.

Senator HATCH. It says they are exacerbated by not having natural resources which are developed.

STATE DEPARTMENT MEMORANDUM REPUDIATED

Mr. COOPER. What I am saying is that that is not a true statement. I think that many of the other statements in that memo fail to recognize what is going on in the world at large. A number of those statements can be applied to dozens and dozens of countries, including European countries, around the world.

The reason for emphasizing this is that the suggestion in the memo is that somehow it is faulty Panamanian policy which has run Panama into these difficulties. Without in any way wanting to endorse Panamanian policy because I do not have a judgment on that, all I want to say is that there are many countries around the world that have pursued policies that are about as sensible under the external circumstances as they could be and they find themselves in similar difficulties. Therefore, I find myself skeptical of the conclusions implicit in the memo.

The important question is looking forward what can be done to make Panama into a more viable economy. The economic development package, which is a cooperation effort, which we have talked with the Panamanians about is designed to help them in the process of developing their economy.

I think because of its location and because of the degree of education of its labor force compared with its neighbors, and for other reasons, it would not be surprising if Panama did find itself with relatively low net exports of agricultural products, for example, and engaged heavily in provision of services.

If I understand it correctly, it is going forward. The copper mine will come on line in several years' time and produce.

Senator Hatch. Developed by American companies.

Mr. Cooper. It is basically American companies that are developing it, sure, but that is true elsewhere in the world also.

Senator Hatch. Let me refer you to this so you can find it easily. It is in the September 27, 1977, Congressional Record. That might save some time.

Basically your own State Department was pretty harsh in its analysis of Panama's economic policy.

Mr. Cooper. When was the memorandum written?

Senator Hatch. October 26, 1976.

Mr. Hansell. That, of course, was a prior administration.

Senator Hatch. It is still the Department of State, presumably the election here did not change the facts in Panama.

Mr. Cooper. Senator Allen asked me what my role was in the State Department and how long I had been there. One of my roles is to improve the economic competence of the foreign service.

Senator Hatch. You are choosing a very poor way of doing it in my opinion. Nevertheless, let me ask you some more questions.

MASSIVE PUBLIC BORROWING

When did the Government of Panama first begin to borrow massive amounts of money from U.S. and foreign banks? Do you know that?

Mr. Cooper. That is a judgmental questional on "massive." I do not know the answer to the question. Their external borrowing stepped up substantially in 1974.

Senator Hatch. On that point, you are aware that around 1969 when Torrijos took over their debt was what? Do you remember?

Mr. Cooper. No.

Senator Hatch. It was less than $200 million but today it is a minimum of $2.7 billion.

Mr. Cooper. No, it is not $2.7 billion. We went over that before. The best number to think of that is germane here is about $1 billion, a little more than $1 billion. The $2.7 billion includes the banking operations located in Panama.

Senator Hatch. Yes, excuse me, the Congressional Research Service has told us $2.7 billion in total external debt of which $1.7 billion is public debt. But, in any event, you are saying that they began to borrow the amounts of money basically from U.S. and foreign banks around 1974.

Mr. Cooper. There was a big jumpup in borrowing in 1974, 1975,

WHERE DID MONEY GO?

Senator Hatch. What was the money used for? Do you know?

The State Department memo indicates that it was not used as a result of OPEC problems or oil problems. What do you think the money was used for?

Mr. Cooper. Ostensibly the money was used to finance social and economic development. The fact is that, as in the case of many countries, including the United States, a lot of external borrowing was used to finance the consumption of oil.

Senator HATCH. I wonder why they did not clean up the eyesore right across from the Canal on the Avenue of the Americas.

As the treaty indicates, the United States is to assume primary responsibility for the protection of the canal over the next two decades. Why is it necessary for us now to give them $50 million in military aid?

Mr. COOPER. What is the purpose of the $50 million in military aid?

Senator HATCH. Yes.

Mr. COOPER. The Panamanians will be taking on additional security responsibilities as time goes on. We jointly felt that it would be useful if the United States equipped the Panamanian Forces to do that. The sums over a 10-year period are relatively modest, but they do reflect the fact that Panama will be taking over additional security responsibilities. We wanted to be sure that they would do that in cooperation with us and felt that the FMS route is useful for that purpose.

SWISS BANK ACCOUNTS

Senator HATCH. Do you or any of your representatives or associates at the State Department, or anybody, to your knowledge have any indication that leaders in Panama have been transferring funds to Swiss banks?

Mr. COOPER. I have no such knowledge.

Senator HATCH. Do you have any knowledge from any source whatsoever, Mr. Hansell?

Mr. HANSELL. No, sir.

EXCLUDING THE GENERAL'S BROTHER, NO INFORMATION ON DRUG PUSHERS

Senator HATCH. Do you have any information whatsoever that anybody in Panama, other than the general's brother Moise, has been trafficking in drugs?

Mr. HANSELL. No, sir.

Mr. COOPER. I have no such knowledge.

Senator HATCH. Would you check with the State Department and provide us with any information you find in the State Department file anywhere concerning trafficking of drugs?

Mr. HANSELL. I think whatever information there is on that subject has been provided to the Senate Intelligence Committee which has conducted its own investigation on that issue.

44 DEA FILES

Senator HATCH. Have the 44 files that were formerly in the Drug Enforcement Administration, about which Senator Dole talked, that all of a sudden were not there—have they been provided to the Senate Intelligence Committee?

Mr. HANSELL. I have no knowledge.

Senator HATCH. You are aware of Senator Dole's comment on the floor of the Senate Friday 3 weeks ago as well as my comments and those of Senator Thurmond?

Mr. HANSELL. I think the matter of those files is addressed properly to the Department of Justice, this is not a Department of State function.

Senator Hatch. I wonder then why our Embassies abroad have career diplomats serving as drug enforcement coordinators. But, all the same, you are aware, aren't you, that Senator Dole accused the administration of secreting 40-plus files from the Drug Enforcement Administration, moving them from the normal location, rifling through them, and not provided them for the review of the American people?

Mr. Hansell. I am aware of the accusation.

Senator Hatch. You are aware that he accused Torrijos of being directly involved in the drug trafficking business? You are aware of that? Have you taken time to look into those remarks just to satisfy your own curiosity?

Mr. Hansell. We have made our own thorough examination of these charges. We have made available to the Senate Select Committee on Intelligence every scrap of information available to the executive branch——

Senator Hatch. Did you ask for the 40-plus files?

Mr. Hansell [continuing]. That is in fact available.

Senator Hatch. Are you saying those files are not available? Wouldn't that be something that the State Department would want to look into in its work on the intelligence aspects of the negotiations of these treaties?

Mr. Hansell. Not only have we looked into it, but——

Senator Hatch. Have you read the 44 files?

Mr. Hansell. I would suggest that perhaps Mr. Beckel who has been very deeply involved in that matter might want to comment in response to your question.

This is Mr. Robert Beckel. He is Deputy Assistant Secretary.

Senator Hatch. Have you read the 40-plus files?

Mr. Beckel. I have read DEA files, yes.

Senator Hatch. All of these files listed by Senator Dole?

Mr. Beckel. I am not aware of the files listed by Senator Dole.

Senator Hatch. You are aware that they were taken out of the Drug Enforcement Administration?

Mr. Beckel. No. not at all.

Senator Hatch. You are assuring us that they were not taken out?

Mr. Beckel. I have no idea. I work for the Department of State, Senator. No information has come into my hands.

Senator Hatch. Do you want us to provide you with the numbers so you can look them up?

Mr. Beckel. If the DEA would allow me to go through their files, I suppose, but I suggest you turn that over——

Senator Hatch. This has to do with a tremendous problem for the American people. Don't you think that that is something you should insist upon seeing?

Mr. Beckel. I think if you have a question about it, you should direct it to——

Senator Hatch. I am directing it to you.

Mr. Beckel. I do not have access to DEA files. I cannot respond.

Senator Hatch. You just said you read the DEA files. Now you are saying you don't know anything about it?

Mr. Beckel. I do. I know what the State Department's involvement has been in the allegations against General Torrijos and members of his family. I was asked to undertake a thorough search of our files on behalf and at the request of the Senate Committee on Intelligence, as well as the Presidential directive to brief the leadership of the Senate and the Intelligence Committee, both the majority and the minority, which was done.

The administration, the State Department, the DEA, the Justice Department, and the Customs Bureau have all been forthcoming in turning their files over to the Select Committee on Intelligence.

I suggest if you have questions, Senator, that that committee is the proper——

Senator HATCH. I am asking you whether anybody in the State Department asked you to look at those files.

Mr. BECKEL. I have looked at those files, yes.

Senator HATCH. You have looked at those files?

Mr. BECKEL. I have looked at the files that were in the Department of State.

Senator HATCH. Have you looked at those files that Senator Dole, the distinguished Senator from Kansas, said were taken away from the Drug Enforcement Administration and secreted elsewhere?

Mr. BECKEL. I would be happy to if I knew what they were, but I have no idea——

Senator HATCH. If we provide you with the numbers and the file headings, whatever they are, would you be happy to look them up and report back to us?

Mr. BECKEL. I would be more than happy to take a list and turn it over to the DEA and ask them if they would respond to you. You see, I am in the Department of State. I simply cannot go through their files.

Senator HATCH. I think the Department of State should be interested in these accusations. These are the people we are talking about having control of a vital, strategic waterway.

Mr. BECKEL. Absolutely. The President of the United States is interested in these accusations. That is why the executive branch and all departments and agencies that have had files on these matters have turned those files over to the Select Committee on Intelligence. I believe that the DEA has turned over all their files. I would suggest that if Senator Dole has some file numbers, then he ought to check with the Select Committee on Intelligence before he makes accusations which I do not think are substantiated.

NOT PROVEN—YET

Senator HATCH. I think it is substantiated.

Mr. BECKEL. It has not been proven yet.

Senator HATCH. That is because they have been secreted and nobody has seen them. That is because Senator Dole's Freedom of Information Act request has been ignored.

Mr. BECKEL. That is a very serious allegation.

Senator HATCH. I suggest it is a very serious allegation. I suggest that it is even more serious that the State Department has apparently not gone and looked into it and gotten those files.

Mr. BECKEL. Senator, I would suggest that the State Department, and the President, and the Secretary of State have taken extraordinary interest in this matter. I personally have gone through a number of files involving this matter, and I have found none of the allegations that you, and Senator Dole, and others have made to be accurate.

Senator HATCH. Then why hide them? But let me make sure I understand you; in other words, you are seriously saying you do not have any evidence to believe that there is drug trafficking by any of the top leaders in Panama?

Mr. BECKEL. I have seen nothing in the files that I have looked at that would indicate——

Senator HATCH. You have seen nothing that implicates Omar Torrijos' brother, an ambassador in Panamanian service.

Mr. BECKEL. I have not seen anything to which I would have access. There is information in the Justice Department that I would not have access to.

Senator HATCH. So all you are saying is based on the material that you have had access to in the State Department, which is to say that based on that you do not know whether they are involved or not involved.

Mr. BECKEL. The information that I have had access to would lead me to say that Omar Torrijos certainly is not involved. I think that is obviously something the U.S. people, the Congress of the United States, and the executive branch would like to have the answer to.

DEA–GF–TORRIJOS, OMAR

Senator HATCH. So would I. I would like to see the files.

One of these files is entitled "GF–Omar Torrijos." It is a general file.

Mr. BECKEL. Is that a DEA file?

Senator HATCH. Yes. It is not classified. Have you read that?

Mr. BECKEL. Is it a DEA file?

Senator HATCH. It is.

Mr. BECKEL. It is entitled what?

Senator HATCH. "GF-Omar Torrijos." It is a nonclassified file. Have you read that?

Mr. BECKEL. I have no idea——

Senator HATCH. Would you read that and provide us with copies of what is in there?

Mr. BECKEL. I could not provide you with copies of the DEA files.

Senator HATCH. Would you ask them to provide those?

Mr. BECKEL. Let me say this: If you have information on files that have not been delivered to the Select Committee on Intelligence from any other agency or department, the State Department certainly will insist, as the President has, that all information be turned over. Frankly, Senator, I would be amazed if there were any files that were not turned over from the DEA or any other agency.

COVER UP?

Senator HATCH. So would I but that was the accusation. Also there is the problem of completeness, and the problem of deletions, and the problem that one or two files might have been "overlooked." Have you contacted Senator Dole to get the numbers of those files?

Mr. BECKEL. No. I would suggest to you that I am not aware of the statement that was made on the floor. I was aware of the accusation that Senator Dole, you, and other Senators made. I have not been provided a list of specific——

Senator HATCH. You did not read that particular statement in the record?

Mr. BECKEL. No.

Senator HATCH. Would you please contact Senator Dole and ask him for the numbers of the files, obtain those files, read them, and then report back to us?

Mr. BECKEL. I would be happy to contact Senator Dole's office to see which information from the U.S. Government has not been forthcoming.

Senator HATCH. I think he can give you the numbers of the files.

Mr. BECKEL. Fine. We will do that.

Senator HATCH. You will do that, and then we want a report back one way or the other.

Mr. BECKEL. No, Senator, what I will do is to see the list of the files that Senator Dole has asserted have not been turned over to the Congress. If they have not been turned over, I will suggest that they be turned over to the Senate Select Committee on Intelligence.

Senator HATCH. But you will notify us of the files and your request that they be turned over?

Mr. BECKEL. Yes. If I find the files the Senator has listed have not been turned over to the Select Committee on Intelligence and that that is confirmed by the DEA, we would be happy to let this committee or any committee know.

If there are any files that have not been turned over, they certainly will be turned over.

Mr. HATCH. We appreciate that. We hope you do not meet the resistence others have experienced.

CANAL COMMISSION DEBTS

Assuming that the new Canal Commission runs up some debts, and I think that is going to be a pretty fair assumption, what is going to happen to these liabilities at the end of the term of the Panama Canal Treaty?

Let's assume that the liabilities are really incapable of being paid by the Panamanians at the end of the lifetime of these treaties. Whose is going to pay for those?

Secretary COOPER. I am not sure that I caught all of the assumptions that you made. It is possible for us to assume ourselves into a corner from which there is no solution.

However, let me address what I think is your general concern because it is a fair one.

We are engaged in an enterprise here during the life of the treaty which will be passed on as a going enterprise at the end of the treaty. The question is what is the financial structure of that enterprise as it is passed on.

I am now making a guess about management practice. Management practice during the next two decades will be such that any major investment that the Canal Company or the Canal Commission undertakes will be discussed with the Panamanians, assuming those investments carry on beyond the life of the treaty, and we will reach an understanding before undertaking new, major obligations on how those obligations will be disposed of when the passage of authority from the Commission to the Panamanians takes places around the turn of the century.

NO KNOWLEDGE OF INFORMAL STATEMENT THAT LOANS NEED NOT BE REPAID

Senator HATCH. Do you know if any of the negotiators, or anyone for that matter, has ever advised the Panamanians that they would not have to pay back these debts which are described in your statement?

Mr. COOPER. Which debts are you talking about?

Senator HATCH. I am talking about the $75 million in AID, the $200 million in Export-Import Bank loans and guarantees, and the OPIC.

Mr. COOPER. The assumption on both sides is that those are debts of exactly the nature that they are with any other country and they are fully expected to be repaid. That is our understanding, and that is our understanding of the Panamanian understanding.

Senator HATCH. Yes; but one of the previous witnesses before the committee testified that he understood that the Panamanian negotiators had been advised by our negotiators that they needn't worry about paying back these long-term loans. Do you know anything about that?

Secretary COOPER. I know nothing about that, no.

Senator HATCH. In fact, there have been reports that Ambassador Linowitz may have testified to that effect before the Senate Committee on Intelligence.

Did you or anyone else in the State Department, to your knowledge, ever advise the Panamanians that it would not be necessary to pay back these loans?

Mr. COOPER. No.

Senator HATCH. Have you ever heard anyone at the State Department say that former Ambassador Linowitz or any negotiators ever advised the Panamanians that repayment of these loans could be ignored?

Mr. COOPER. No.

THE CASE ACT

Senator ALLEN. Which of these executive agreements, if any, were filed with the Senate under the Case Act?

Mr. HANSELL. Senator, all the agreements will be submitted when they become effective.

Senator ALLEN. Including the unilateral agreement?

Mr. HANSELL. All those are in fact agreements—and I cannot speak to which ones were so regarded, but I know that we were in close touch with the Senate Committee on Foreign Relations with respect to these documents. We can identify for you which ones were submitted.

Senator ALLEN. Obviously we can get the information from the Secretary of the Senate, but I would like for you to supply the information as to whether the unilateral agreement about which you spoke, providing for the $345 million in loans and guarantees, was filed or not filed with the Senate under the Case Act and, if filed, the date submitted.

Mr. Hansell. We will be glad to give you a list of everything that is submitted.[1]

Senator Allen. If you would do that for the record, we would appreciate it.

Assuming your premise that the Congress can set the terms for the operation of the canal and the various payments that the Panama Canal Commission could make, legislation presumably could be the place where this $16 million a year interest payment might be continued.

I might point out to you that you state that sometimes the company has not been able to pay the $16 million even though the annuity to Panama is only $2.3 million. What chance do you think there would be of paying the $16 million assuming Congress can require that to be done? What chance do you think there would be of getting the $16 million paid when it came in back of sums of $60 million or $70 million a year in payments to Panama? If the Treasury could not get it when the payment was $2.3 million, what chance does the Treasury have of getting it when the payment to Panama is 35 times that much?

Mr. Hansell. It would be a function, of course, of future circumstances which I cannot predict, including toll revenues, costs and expenses, canal traffic. I just could not begin to guess what all those would add up to as a net figure in any given year in the future.

NO INCONSISTENT STATUTE

Senator Allen. Could the Congress pass any statute in implementation of the treaty inconsistent with the provisions of the treaty?

Mr. Hansell. I would not think so. You say "inconsistent with." The legislation, of course, that Congress will pass can supersede the terms of prior treaties.

Senator Allen. Let's get that again. You say that Congress can pass a law that supersedes the provisions of the treaty?

Mr. Hansell. Yes, sir. The treaty, of course, as you know, is law under the Constitution. Subsequent legislation enacted by Congress is also law. Within some limitations that I think we would want to articulate in a written response——

Senator Allen. I believe you would want to reconsider that answer.

Mr. Hansell. It is the power of the Congress to enact, subsequent to a treaty, legislation that can affect the domestic legal effect of the treaty.

Senator Allen. No, sir, I think you will find that Congress cannot pass a statute which unilaterally would change the terms of a treaty because a treaty under the Constitution becomes the supreme law of the land. It cannot be varied by statute. So the Congress in my judgment could not pass any law inconsistent with the provisions of this treaty. That is where I think your premise that we could work out something through legislation on this interest payment would fall.

Mr. Hansell. Let me say that I was not contemplating anything that would be inconsistent with the terms of the treaty. I would not regard the kinds of arrangements we were discussing previously to be inconsistent with the terms of the treaty. Quite the contrary, they would be implementing the terms of the treaty.

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[1] See page 467.

Senator ALLEN. If the treaty wipes out the unpaid equity, which testimony indicates is the case, then there would be no occasion for activating this indebtedness. There would be no power in Congress to reactivate the unpaid equity in my judgment.

Secretary COOPER. Are you talking about during the life of the treaty or subsequent to the life of the treaty?

Senator ALLEN. In either case, if the treaty wipes out the unrecovered equity of the United States, Congress could not reinstate that sum.

Secretary COOPER. The implementing legislation to my knowledge has not been worked out in detail, but I don't think there is a suggestion that the equity as such is wiped out.

Senator ALLEN. I understood you to testify exactly that.

Secretary COOPER. During the life of the treaty, no.

Senator ALLEN. When will it be wiped out?

Secretary COOPER. When the Panama Canal as a going operation is passed to Panamanian management—and that would be in the year 2000—this particular equity item would, in effect, be passed with it.

Senator ALLEN. Yes, and undoubtedly unrecovered. But where then is the provision that interest will continue to be paid on this equity investment?

Secretary COOPER. That is not in the treaty.

Senator ALLEN. That is the point.

ANOTHER AMBIGUITY

Secretary COOPER. That is not in the treaty, but I think what Mr. Hansell was saying was that neither in the treaty is it that interest will not be continued to be paid on this investment. That issue is left open.

Senator ALLEN. That is another one of these ambiguities about which we hear.

Mr. HANSELL. I think you are looking for a provision that would not normally be in the treaty, and it is not in the treaty. That is not a subject matter that is covered.

Senator ALLEN. What about the agreement on unrecovered equity? Where is that?

Mr. HANSELL. I think you will find on analysis that this is a matter for the operation of the Canal Commission, its revenues and expenses, and whatever direction it receives as a matter of legislation.

Senator ALLEN. They apparently recognize the obligation now but there is no assurance that the obligation will be recognized after the treaty is approved.

Mr. HANSELL. That is because the Canal Company is in existence. The Canal Commission has yet to be created by legislation.

Senator ALLEN. I understand that. The treaty is silent on the continuation of this obligation. The Commission presumably takes it over but without the assumption of that payment.

Mr. HANSELL. So is the existing treaty silent on the payment of the $16 million. The existing treaty does not provide that.

Senator ALLEN. Yes, but we have full control and no obligation to pay $70 million off the top.

Mr. **Hansell.** It is a matter of legislation in the implementation of the functions of the Canal Company. I think you will find there is not a difference in that respect between the existing arrangement and the future arrangement.

Senator **Allen.** It does not carry over. That is the point that I am making. That is your own statement—that it does not carry over. Frankly, the main purpose of this new Commission seems to be to stick the taxpayers with a loss of $319 million in unrecovered equity and a loss of $16 million a year in interest. Otherwise, why would you not have used the existing Panama Canal Company.

We have promised these gentlemen to release them at 12:30 for a prior engagement.

Senator **Hatch.** I would like to make one closing comment.

We appreciate the testimony that you have given. We will look forward to working with you on trying to solve this drug trafficking problem.

What I am additionally and particularly concerned about is that the State Department is ignoring the appropriations process, in addition to transferring property without the consent of Congress, has done so deliberately. That is what we believe has happened here. I believe the State Department has done so because it knows that it would not only complicate matters but also that it could not get these treaties through the House of Representatives. That assessment may or may not be accurate. I don't know.

What I am concerned about is that we are setting up treaties here that certainly do nothing for the United States monetarily, and maybe nothing otherwise. And we are violating the Constitution in the process.

We are allowing this whole country to rely on what we are doing when we have not gone to the underlying cause of Panama's problem, which is economic. In the process we may be consigning Panama over the long run to the very enemies that we are fearful of. What I am also concerned about is that I think we are doing it in a back way manner. The facts are being hidden from public scrutiny.

I know you represent the State Department, and I think you both have admirably done that.

I am concerned about having a bigger problem with the treaties than we have now. I think because of the approach that has been made, not by you gentlemen but by those who have effectuated these treaties through the years, that we are in a worse problem today than we might have faced. We might have been able to have treaties that really could have been satisfactory to both countries without all the repercussions that we now have going on. That is my particular viewpoint. Any one of us could be wrong on any one of these points. But why these treaties? Why have you not brought to us something the people of the United States can in good conscience support?

All we can do is the best we can sincerely, and I think that is what you gentlemen certainly want to do and that is what I want to do. But I am deeply concerned about some of the points that have been raised, about some of the information that has managed to come to light.

We would appreciate, Mr. Beckle, as much information as we can have.

I would like you also to look over the October 26, 1976, State Department memo, Mr. Cooper, because it says they have a lot of economic problems, and the treaties that are presently negotiated will not solve those problems. We are going to be continually called upon for solutions that are in excess even of these incredible treaties, which go far beyond what I believe the majority of the Americans want us to do.

I think these issues are important issues. Maybe you fellows might be able to help your cohorts there at the State Department wrestle with them * * * for the benefit of our country.

I appreciate your testimony today.

Senator ALLEN. Thank you very much. Secretary Cooper and Mr. Hansel, you have both been most cooperative. You have been forthcoming and most helpful to this committee. We appreciate your indulgence.

The subcommittee will recess to reconvene subject to the call of the Chair.

[Whereupon, at 12:35 p.m., the subcommittee recessed to reconvene at the call of the Chair.]

[The following information was subsequently supplied for the record:]

QUESTIONS SUBMITTED BY SENATOR ALLEN TO HERBERT J. HANSELL, LEGAL ADVISER TO THE SECRETARY OF STATE AND ANSWERS BY MR. HANSELL

Question 1. Your duties as Legal Adviser to the Secretary of State are quite wide-ranging, but would you briefly summarize those responsibilities and state how long you have been in your present job?

Answer. Mr. Hansell is the principal legal officer of the Department of State. He acts as legal adviser to the Secretary of State and to other Departmental officers. He was sworn in as Legal Adviser on April 8, 1977.

Question 2. Were you employed at the Department of State prior to that time?

Answer. Mr. Hansell was not employed at the Department of State prior to that time.

Question 3. Did you give legal advice to our negotiators during the conduct of the negotiations which led to the present proposed Panama Canal treaties? Did you give legal advice in prior negotiations?

Answer. Mr. Hansell did give legal advice on a number of occasions to the U.S. negotiators during the negotiations of the Panama Canal treaties. Two lawyers on his staff served as members of the U.S. negotiating team throughout the negotiations. Mr. Hansell did not give advice during treaty negotiations prior to 1977.

Question 4. Mr. Hansell, are you familiar with a memorandum dated April 8, 1955, prepared by one of your predecessors in the Office of the Legal Counsel, Mr. Herman Phleger, in which Mr. Phleger described the practice on the part of the United States with respect to the annuity then paid to the Republic of Panama, as follows:

"At the present time, the annuity payments made to Panama are pledged to service Panamanian bonds. For many years the payments by the United States have been made, under irrevocable instructions from the Government of Panama, directly to New York Banks."?

Answer. Mr. Hansell was not familiar with the 1955 memorandum prepared by Mr. Phleger, but he is and has been aware of the arrangements under which Treaty payments are made directly to various fiscal agents for the Government of Panama in connection with certain issues of Panamanian Government bonds.

Question 5. The same memorandum reports that the Secretary of State on April 14, 1950, advised the Government of Panama, with respect to the hypothecation of the Panama Canal annuity, as follows:

"[The United States] would have no objection to the pledging of the Canal annuity as security for a new loan, provided it is determined that the refunding plan assures full protection to the holders of the present external debt of the Republic of Panama to the payment of which this annuity is presently pledged."

Additionally, shortly prior to the signing of the Panama Canal Treaty of 1955, Mr. Phleger advised the Secretary of State by memorandum dated May 3, 1955, as follows:

"As the treaty is drafted, I see nothing that would prevent the hypothecation of the monies to become due to Panama under the 1955 treaty."

Please state to the Committee if similar advice has been given in connection with these proposed treaties?

Answer. Mr. Hansell has not given similar advice in the form of a memorandum to the Secretary of State, as was done in 1955. However, the Office of the Legal Adviser has advised both the treaty negotiators and other Department of State officers that the payments to be received by Panama under the Panama Canal Treaty could be assigned by Panama to its fiscal agents as security for these bonds in the same fashion as the 1955 Treaty payments are currently pledged. Moreover, the Department of State has discussed this matter with both representatives of bondholders and Panamanian officials, and it is understood that Panama intends to hold discussions in the near future with the bondholders and fiscal agents to work out appropriate technical adjustments to their existing arrangements in order to continue the security for these bonds after the new treaties are ratified. The U.S. does not expect to be directly involved in those discussions, however.

Questions 6 and 7. Twenty million dollars is proposed pursuant to these agreements (Note Regarding Economic and Military Cooperation) to go to Panama as loans or loan guarantees to the Panamanian development bank, COFINA. Please state where you find statutory authority for the Overseas Private Investment Corporation to make loan guarantees on interbank transactions of the sort obviously contemplated by this executive agreement. Have such interbank loan guarantees ever before been permitted? If so when and to whom were the guarantees extended?

Answer. OPIC promotes development of private enterprise in the developing countries in various ways including the financing of Intermediate Credit Institutions which, in turn, finance private projects in such developing countries. OPIC's authority to finance ICI's is found in its general guaranty authority under Section 234(b) of the Foreign Assistance Act of 1961, as amended to further the general corporate purposes of OPIC set forth in the Act specified in Section 231.

Section 231 provides that OPIC shall undertake "(b) too utilize private credit and investment institutions and [OPIC's] guaranty authority as the principal means of mobilizing capital investment funds . . ." In the case of COFINA, OPIC would mobilize the funds of a U.S. lender by guaranteeing its loan to COFINA.

When OPIC supports an ICI, OPIC carefully reviews the investments made by it to determine that they promote private enterprise in such countries. In fiscal 1975 OPIC guaranteed a loan to the ICI Confederation of Latin American Credit Unions ("COLAC") in Panama for relending to credit unions throughout Latin America. In the past OPIC has made loans from its direct investment fund ("DIF") to such ICI's as ADELA in Latin America, and PICA and Korea Capital Corporation in the Far East. In fact, OPIC's legislative history evidences consistent Congressional interest that OPIC work closely with ICI's. OPIC's legislation contains no restrictions that prevent it from guaranteeing loans from U.S. lenders to ICI's wholly-owned by a government.

COFINA is an example of an ICI which supports private enterprise in Panama. Before OPIC would approve the proposed loan guaranty, COFINA's operations would be carefully investigated and the guaranty would require approval by OPIC's Board of Directors.

Questions 8 and 9. I was interested in the comment in your prepared statement to the effect that the executive agreement providing for all of these various loan programs is not, in any sense, legally binding on the United States. I would note that the SALT Accord in Vladivostok, the Final Act at Helsinki, the Sinai Accords, the Nixon-Thieu letters, the Soviet oil and grain agreements, and the Paris Agreement on the War in Vietnam were all also handled as executive agreements permitting our negotiators to wheel and deal free of Congressional constraint and that in each case the Department of State found it convenient to avoid characterizing these documents as legally binding, but they have certainly embodied major foreign policy decisions and have had a significant effect on our country and indeed on world history. If this particular executive agreement (Note Regarding Economic and Military Cooperation) is not legally binding, it does promise something to Panama, does it not? In legal parlance, is this executive agreement somewhat akin to a promise which cannot be enforced against the promisor because of lack of consideration?

Do you think that Panama should be specifically advised in writing that this document (Note Regarding Economic and Military Cooperation) has no legal effect?

Answer. The United States Note Regarding Economic and Military Cooperation is a unilateral statement to Panama that the United States "is prepared to agree," within the limitations of U.S. legislation and subject to the availability of appropriated funds, to certain economic and military cooperative projects with Panama. It is not legally binding and is not an agreement between the two Governments. The text of the Note stipulates that the United States undertakings "will enter into force upon an exchange of Notes to that effect between our two governments." There will be a legally binding international agreement between the two Governments upon the exchange of Notes, although that undertaking would be fully subject to the qualifications set forth in the Note.

The Government of Panama is completely familiar with the legal status of each of the agreements and other documents related to the Panama Canal Treaties.

Question 10. One of the problems of non-binding executive agreements is that frequently the other side does not understand that these agreements are, in fact, non-binding or at least asserts a lack of understanding to that effect. A perfect example is the Russian position on the SALT Accord signed by President Ford in Vladivostok. Since that Accord was not legally binding, the negotiators for the United States did not put much stock in it one way or another, and President Ford did not seek the advice and consent of the Senate, but the Soviet Union has kept insisting all along during the recent renewed SALT negotiations that the United States has deviated from its word. Don't you think that it would be a good idea for the United States either to have legally binding executive agreements or no agreements whatsoever, or at a minimum to disclaim legal effect in precise language in the document itself? Don't the dangers of misinterpretation otherwise outweigh the advantages of promised but non-obligated performance?

Answer. All executive agreements are legally binding under international law. There are occasions upon which the United States enters into a political or moral commitment that is not legally binding, but in such cases the legal status of such commitment is clearly understood by the parties thereto. For example, at the concluding session in Helsinki of the Conference on Security and Cooperation in Europe, all of the parties, including the United States, agreed that the Final Act of the Conference was not legally binding, and this was reflected in the language of that document. However, the fact that there is no specification in an agreement does not normally lead to misunderstandings or misinterpretations concerning its status.

It is United States practice to have the legal status of its international arrangements clearly understood by all parties to them, including whether they are legally binding agreements or some other kind of arrangement. In any event, specification that a document is not legally binding, or is not a formal agreement, does not preclude governments from asking for compliance with whatever political or moral commitments have been undertaken. This is perhaps best illustrated by the Helsinki Final Act and the practice thereunder.

Question 11. I note again from your response to the questions of the committee that you do not consider this Note Regarding Economic and Military Cooperation to be legally binding. Has this agreement nevertheless been reported to the Congress under the terms of the Case Act?

Question 12. Do you assert that the Case Act requires the reporting only of "legally binding" executive agreements?

Answer. The Note Regarding Economic and Military Cooperation has not been transmitted to the Congress under the Case Act because it is not a legally binding agreement.

The Case Act requires the transmission to the Congress of international agreements other than treaties (executive agreements). The legal view and practice of the United States, as well as of the world community, it is to consider as international agreements commitments that are legally binding.

Question 13. Mr. Hansell, you are undoubtedly familiar with the Department of State Circular #135. As you know, Circular #135 defines the difference between a treaty and an executive agreement somewhat in this fashion: A treaty is an agreement with a foreign country which is subject to the advice and consent of the Senate and an executive agreement is an agreement with a foreign country which is not subject to the advice and consent of the Senate. In effect, the Department of State asserts absolute authority to decide which agreements are executive agreements and which are treaties. Now, to me, it seems that an agreement to provide some $345 million in aid might be elevated to the status of a treaty when the $345 million directly figures in concurrent treaty negotiations of a plenary nature. But the Department of State, pursuant to Circular #135, has felt free simply to characterize the agreement as an executive agreement and thereafter to have done with the matter, dispensing with the advice and consent of the Senate. Perhaps you could state to the Committee your own definition of the difference between a treaty and an executive agreement.

Answer. Several factors are relevant to deciding whether a particular agreement should be a treaty or an executive agreement. As set forth in the regulations known as Circular 175, these factors are as follows:

"a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;

"b. Whether the agreement is intended to affect State laws;

"c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

"d. Past U.S. practice as to similar agreements;

"e. The preference of the Congress as to a particular type of agreement;

"f. The degree of formality desired for an agreement;

"g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and

"h. The general international practice as to similar agreements."

Senator Sam Ervin's Subcommittee on the Separation of Powers of the Senate Judiciary Committee, after hearings in 1972 on this subject, wrote:

"American constitutional law recognizes, in the Constitution itself and in judicial opinion, three basic types of international agreement. First in order of importance is the treaty, an international bilateral or multilateral compact that requires consent by a two-thirds vote of the Senate prior to ratification. . . . Next is the Congressional-executive agreement, entered into pursuant to statute or to a preexisting treaty. Finally, there is the "pure" or "true" executive agreement, negotiated by the Executive entirely on his authority as a constituent department of government.

"It is the prerogative of the Executive to conduct international negotiations; within that power lies the lesser, albeit quite important, power to choose the instrument of international dialog."

(93d Con., 1st Sess., Congressional Oversight of Executive Agreements 6 (Comm. Print 1973)).

In the case of the Note Regarding Economic and Military Cooperation, the U.S. wished to assure that our rights under the Panama Canal Treaties would not be contingent upon implementation of the programs described therein. Accordingly, it was not in the U.S. interest to include these programs in the Treaty. The fact that we succeeded in our efforts to obtain Panama's agreement to this arrangement does not imply that the Administration does not intend to press for implementation of the program which we consider to be in the U.S. interest. What it does imply is that our legal rights with respect to the Panama Canal will not be conditioned in any way on the ultimate outcome of this independent undertaking.

Question 14 and 15. Many leading Constitutional authorities on executive agreements, such as Professor Raoul Berger, have disagreed with the position of the Department of State on this subject, but in any event this issue of treaty versus executive agreement is a basic issue of separation of powers between two branches of government and therefore does resolve itself into a question of what action each branch can take to protect its own prerogatives and powers. In that connection, are you familiar with Senate Resolution 24 introduced in this Congress by Senator Church and cosponsored, I might add, in the last Congress by then-Senator, now-Vice President Mondale?

Does the Department of State favor the passage of S. Res. 24?

Answer. The Administration has set forth its position with respect to the proposed S. Res. 24, in a letter to a report to the Chairman of the Senate Foreign Relations Committee dated December 30, 1977. We would be pleased to provide a copy to this Committee.

STATEMENT CONCERNING NOTE REGARDING ECONOMIC AND MILITARY COOPERATION

At the hearing on November 15, the question was asked whether the Note Regarding Economic and Military Cooperation had been reported under the Case Act. The answer is that that Note has not been transmitted to the Congress under the Case Act because it is not a legally binding agreement.

QUESTIONS ADDRESSED TO RICHARD N. COOPER, UNDER SECRETARY OF STATE FOR ECONOMIC AFFAIRS

Question 1. Please describe briefly your present duties at the Department of State?

Answer. Under Secretary Cooper serves as the Under Secretary for Economic Affairs. He was appointed by the President by and with the consent of the Senate as stated in PL 92–353. His principal responsibilities consist in advising the Secretary of State on international economic affairs and in carrying out the Secretary's directives in this field. This activity consists in: giving broad supervision to the Department on economic policy issues; coordinating U.S. economic policy with other agencies, consultation and negotiation with representatives of foreign governments, and assuming specific responsibilities as directed by the Secretary of State.

Question 2. How long have you served in your present job?

Answer. Mr. Cooper was sworn into office as Under Secretary for Economic Affairs on April 8, 1977.

Question 3. Were you employed at the Department of State prior to your appointment as Under Secretary of State for Economic Affairs? If so, in what capacity?

Answer. From August, 1965 to August, 1966 Mr. Cooper was Deputy Assistant Secretary for Economic Affairs responsible for international monetary issues. From time to time, over the past several years, he has been a consultant to the Department, and from February 3 to April 8 he served in the Department as a Foreign Service Reserve Officer, Class–1.

Question 4. You participated in certain of the negotiations here in Washington with Minister Nicolas Ardito Barletta, Minister for Economic Planning and Development of the Republic of Panama. When were those meetings held, and how many were there?

Answer. Under Secretary Cooper participated in three meetings of discussions and negotiations with the Panamanian Minister, Mr. Nicolas Ardito Barletta on June 28, 1977, June 30, 1977 and July 13, 1977.

Question 5. Did you participate in any negotiations in Panama?

Answer. Under Secretary Cooper did not participate in negotiations in Panama.

Question 6. At what point in time did you begin to be advised of the specific progress in the negotiations and specifically, when were you given information regarding the proposed loan package later discussed in direct negotiations between you and Minister Barletta?

Answer. Under Secretary Cooper followed the progress in Panama Canal negotiations only at a distance and in general until late June 1977, at which time he was requested by the Secretary to hold conversations with the Panamanians on certain economic issues. He subsequently participated in the meetings with the Panamanians listed in the answer to question 4.

Question 7. Who else attended these discussions on economic aid to Panama?

Answer. These discussions included at various times Under Secretary Cooper, Ambassadors Bunker and Linowitz, Treasury Under Secretary Anthony Solomon, Treasury Deputy Assistant Secretary Arnold Nachmanoff, AID Assistant Administrator Ted Van Dyk, U.S. Executive Director to the World Bank, Edward Fried, U.S. Executive Director to the Inter-American Development Bank, Ralph Dungan, U.S. Executive Director to the International Monetary Fund, Sam Cross, Treaty Economic Affairs Advisor, Richard Camaur, Under Secretary Cooper's Assistant, Jessica Einhorn, and Peter Gosnell of the Eximbank.

Question 8. Please identify all representatives of the United States, whether or not directly employed by the United States, who, on July 16, 1977, discussed with any representative or official of the Republic of Panama any matter involving the financial aspects of the proposed Panama Canal treaties or the economic aid commitment set forth in the executive agreement dated September 7, 1977, entitled "Note Regarding Economic and Military Cooperation." (Please consult records available to you at the Department of State to provide a full response in the event you do not have personal knowledge of the information sought.)

Answer. A check of records at State, Treasury and Defense indicated that no meeting with Panamanian representatives was held on the date in question regarding economic arrangements.

Question 9. Please identify any private citizen of the United States who, purporting to act on behalf of the United States or appearing to act on behalf of the United States, discussed on July 16, 1977, with any representative or official of the Republic of Panama any matter involving the financial aspects of the proposed Panama Canal treaties or the economic aid commitment set forth in the executive agreement dated September 7, 1977, entitled "Note Regarding Economic and Military Cooperation." (Please consult records available to you at the Department of State to provide a full response in the event you do not have personal knowledge of the information sought.)

Answer. The State Department has no information on any private United States citizen who had any discussions on July 16, 1967, with Minister Barletta regarding either the proposed treaties or the economic cooperation program.

Question 10. Please identify all representatives of the United States, whether or not directly employed by the United States, who, discussed with any representatives or official of the Republic or Panama during the month of July, 1977, any matter involving the financial aspects of the proposed Panama Canal treaties or the economic aid commitment set forth in the executive agreement dated September 7, 1977, entitled "Note Regarding Economic and Military Cooperation." (Please consult records available to you at the Department of State to provide a full response in the event you do not have personal knowledge of the information sought.)

Answer. The following persons discussed with representatives of Panama economic arrangements in July 1977: Ambassador Ellsworth Bunker; Ambassador Sol Linowitz; Undersecretary Cooper; Treasury Undersecretary Anthony Solomon; Treasury Deputy Assistant Secretary Arnold Nachmanoff; Treaty Negotiator Richard R. Wyrough; Ambler Moss, Special Assistant to Ambassador Linowitz; Treaty Economic Affairs Adviser Richard Camaur; State Department Financial Economist Robert Taylor; and State Department Consultant Ely Brandes.

Question 11. Please identify any private citizen of the United States who, purporting to act on behalf of the United States or appearing to act on behalf of the United States, discussed with any representative or official of the Republic of Panama during the month of July, 1977, any matter involving the financial aspects of the proposed Panama Canal treaties or the economic aid commitment set forth in the executive agreement dated September 7, 1977, entitled "Note Regarding Economic and Military Cooperation". (Please consult records available to you at the Department of State to provide a full response in the event you do not have personal knowledge of the information sought.)

Answer. Dr. Ely Brandes, of 554 Madison Way, Palo Alto, California. He is President of International Research Associates and has been engaged as a consultant by the Panama Canal Company and the Department of State. During the negotiations, he was engaged by the Department as a consultant on the treaty's economic arrangements. Dr. Brandes also discussed financial aspects of the treaties with representatives of Panama.

Question 12. On February 24, 1959, the Department of State transmitted a note to the Embassy of Panama at Washington which contained a detailed report of the dispensing of $1,430,000 of the annuity for 1959 to various banks in New York with a balance of $500,000 of the annuity for that year being paid into the National Treasury of Panama. On December 12, 1962, with respect to the 1963 annuity payment, the Department of State advised the Ambassador of Panama that, in accordance with the instructions of the Government of Panama, the annual unhypothecated payment of $500.000, which until that time had continued to go to the Treasury of Panama, would cease to be paid to Panama and would be paid instead pursuant to the irrevocable authorization of Panama to the Chase Manhattan Bank. Certainly, one can understand that one reason Panama would wish an increase in its annuity payment is that Panama apparently never sees the money—the money, in effect, being paid pursuant to irrevocable authorization direct to various New York banks.

Please explain in detail the present practice regarding these annuities; are the annuity monies paid direct to New York banks pursuant to irrevocable authorizations or do they go into the Treasury of the Republic of Panama?

Answer. Yes, a total of $1,930,000 of the annual $2.3 million payments under the current treaties is made directly to three New York banks, as fiscal agents for the Republic of Panama, in accordance with irrevocable instructions issued by the Government of Panama to the Department of State.

It should be noted, however, that the New York banks who receive these payments are not the parties in interest in these transactions. Rather, they are employed by the Government of Panama as fiscal agents to administer three separate issues of Panama Government bonds. Two of these issues are traded publicly on the U.S. market, and a third is held by the Prudential Corporation. The banks of course receive a fee for their services as fiscal agents, but they have not assumed any liability to the bond-holders.

We have no reason to believe that these agents had anything to do with Panama's desire to receive an increased compensation from the canal. These arrangements do indicate that Panama has applied the money it has received from past Treasury payments for responsible purposes—assuring repayment to holders of its bonds.

Question 13. Bearing in mind that the Library of Congress reports the external debt of Panama to be some $2.77 billion and the external public debt to be $1.7 billion, do you foresee the hypothecation of increased annuity payments or rents which would come due under the terms of the proposed treaties? In other words, do you believe that the money which would flow from Canal operations which, under the proposed treaties, is guaranteed to Panama would be pledged to cover existing indebtedness or would it be pledged to cover increased indebtedness?

Answer. The World Bank's estimate of Panama's total disbursed public debt is $1.1 billion as of year end 1976. We do not know whether Panama will use annuity payments under the new treaty as a means of covering existing indebtedness or to finance new indebtedness.

Question 14. Please state further in detail any arrangement known to you, or reported in the records of the Department of State, which the Republic of Panama has made or proposed to make with any bank or international financial institution respecting the repayment of existing loans from funds thought to be forthcoming under the financial arrangements set forth in the proposed Panama Canal treaties or in the Note Regarding Economic and Military Cooperation.

Answer. With regard to the loans secured by annuities provided for in the present treaty, we understand that discussions will be held between representatives of the bondholders and fiscal agents and Panamanian officials to work out appropriate technical adjustments in existing arrangements in order to continue the security for those loans after new treaties are ratified. The United States Government has acted as a facilitator in this matter, but will not be directly involved in those discussions. We are not aware of any other discussions between the Government of Panama and any lending institution specifically regarding the use of funds to be derived by Panama under the new treaty arrangements or the programs described in the note.

Question 15. Please state further in detail any arrangement known to you, or reported in the records of the Department of State, which the Republic of Panama has made or proposes to make with any bank or international financial institution respecting the extension of additional loans or credits to Panama.

Answer. Besides the proposals contained in the September 7 note regarding U.S. bilateral economic and military assistance, we understand Panama has submitted loan proposals to the Inter-American Development Bank (IDB) for various pre-investment studies, for agricultural development, and for rural electrification, totalling about $20 million. Loan proposals have also been submitted to the World Bank for support for road maintenance and agricultural credit projects which could total up to $23 million. There may be other loan proposals particularly with commercial banks, of which we are unaware.

Question 16. Please provide to the Committee any information you have, or which is available in the records of the Department of State, regarding the exposure of United States banks or their foreign branches in the Republic of Panama.

Answer. We have nothing to add to the information on this subject provided to Senator Proxmire by the Chairman of the Federal Reserve System and the Comptroller of the Currency which can be found in the Congressional Record for October 25, 1977 on pages S17730 and S17731.

Question 17. Do you agree with Minister Barletta's assessment of the cash flow value of the Panama Canal Treaty as some $2,262 billion over its 23-year term for an annual average of about $100 million? If not, please state the basis for your disagreement with this analysis.

Answer. As you know the major part of the annuity payment to Panama is pegged to the flow of Canal traffic and is subject to adjustment on the basis of price changes. Therefore, since a substantial part of the payments is subject to these variables we cannot predict that any specific amount will be the totality of annuity payments to Panama during the life of the treaty. Our own estimates are on the order of $50–60 million per year for the first years but it is possible that total annuity payments could reach $2 billion, over the life of the treaty, depending on the assumptions made concerning the aforementioned variables.

Question 18. These revenues, in any event, are going to be a substantial increase over the present annuity of $2,328,000. So it would certainly be helpful to the Committee to know what percentage of these increased revenues would return to the United States in the form of payments to New York banks on outstanding indebtedness. Do you have any estimate of the percentage of these increased revenues which would be applied annually against debts to the large international banks or to the large commercial banks located primarily in New York?

Answer. The new treaty annuity payment would increase net Panamanian Government revenue by at least $50 to $60 million per year. We are not in a position to speculate on how such revenue might be applied by Panama to existing indebtedness.

Question 19. Your prepared statement and your response to previous questions have been very helpful, but the Committee needs more detailed information regarding the loans promised by this proposed executive agreement entitled "Note Regarding Economic and Military Cooperation." The agreement provides for $200 million in Export-Import Bank loans. What percentage of United States exports go annually to Panama—excluding, obviously, bank loans?

Answer. In CY 1976 the United States exported $354,173,392 of merchandise to Panama, and $113,232,144,778 to the entire world, including Panama. Thus, exports to Panama made up 0.313% of our total exports for that year. The figure for Panama does not include the Canal Zone, which is treated as a separate foreign entity in the United States statistics.

Question 20. How does the percentage of United States exports to Panama compare with the 1.37% exposure of the Ex-Im Bank in Panama which would result from the proposed $200 million in loans to Panama? How does the ratio of that percentage to exposure compare with similar ratios applicable to other countries?

Answer. Based on conversations with the Export Import Bank, we understand the Bank's possible participation in financing of up to $200 million dollars over ten years might be considered unusual if Panama were viewed simply as a small developing country. But the bank's possible participation up to $200 million is not considered unusual in view of the present size of the Panamanian economy and the improved investment climate which is expected to result from the treaties. Thus, large capital investment projects which may well develop over the next five years in Panama for which United States firms will provide goods and services. The bank does not stimulate these projects but reacts to the initiative of others. Thus the $200 million amount is based on an estimate of business which may come to U.S. suppliers and involve the bank from ongoing exports to Panama, and major capital investments for such projects, among others, as copper development and port improvement. If you would like greater detail on this matter the Bank would be pleased to respond to any direct queries.

Question 21. Who would be the principal borrowers in Panama of the Ex-Im Bank loan money? Would they be government corporations or would they be private importers? If private importers, which firms would be the principal firms to benefit? Identify the principal stockholders or owners of each.

Answer. To date, no Ex-Im Bank projects contemplated under the September 7 note have been prepared or approved. By way if illustration, past Ex-Im Bank projects abroad have included financing of both private and public enterprises, such as utilities, port expansion, industrial plants, and power, transportation and communications facilities.

All Ex-Im Bank projects considered as part of the September 7 note will be subject to all of the institution's legislative and procedural requirements.

Question 22. What repayment terms might be typical of those to be negotiated by Ex-Im Bank should this $200 million loan package be permitted? How long a term? At what interest? How will that interest rate compare with the expected rate of inflation? Could the loans be used to rollover existing debt? Would there be any prohibition on such use?

Answer. Export-Import Bank financing is only for U.S. exports and could not, therefore, be used to rollover existing debt. The Ex-Im "package" is not a loan commitment, but a letter of interest in support of up to $200 million as an estimate of business that might develop and be appropriate for the Bank's participation.

This participation would come under the Bank's two principal areas of operation: (1) insurance for short and medium term commercial credits and (2) for guarantees or direct credits for longer terms. Interest rates on Eximbank direct credits vary, but range between 7¾ to 8¾ percent. It is impossible to predict the rate of inflation. In 1976 the consumer price index rose 4.8 percent; in 1977 it rose 6.8 percent. When Eximbank guarantees a commercial loan, the interest rate is set by the commercial lender. Eximbank does not provide credits at interest rates below its own cost of money. This cost is closely related to private market rates.

Question 23. Fifty million dollars in military credits seems exorbitant for an army of 8000 men of which 7000 perform police functions and of which only 1000 are capable of a combat role. Please comment. Please describe the weapons systems to be supplied.

Answer. Since the $50 million is to be loaned in increments over ten years, we believe the Panamanian National Guard will be fully able to make use of the funds to improve its ability to help defend the Canal. We have been working with the Government of Panama to improve the National Guard's Canal defense capabilities, and we look upon the projected FMS loans as a useful tool in developing this defensive capability. Since funds provided under FMS procedures cannot be used to purchase articles or services for civil law enforcement activities, we will not approve the financing of articles or services which might be used in primarily civil law enforcement function of the National Guard.

The list of defense articles and services which Panama may wish to purchase with the assistance of the planned FMS guaranteed loans will be formulated each year in discussions between the Government of Panama and the United States Embassy Military Group in Panama. The list of articles and services, which we expect will be selected for their usefulness in helping improve the National Guard defensive capabilities, will be included in the documentation submitted to the Congress during the annual security assistance budget hearings. The list of articles for the first year has not yet been determined.

Question 24. Who would be the principal borrowers in Panama of the $50 million in military credits? Would it be the Government of Panama or would they be private importers? If private importers, which firms would be the principal firms to benefit? Identify the principal stockholders or owners of each.

Answer. The guaranteed loans would be made available to the Government of Panama and not to private Panamanian organization.

Question 25. What repayment terms might be typical of those to be negotiated should this $50 million military credit package be permitted? How long a term for repayment? At what interest? How will that interest rate compare with the expected rate of inflation? Could this military credit money be used to rollover existing debt? Would there be any prohibition on such use?

Answer. The repayment period for each of these loans probably would be 5–7 years, with interest charged at the standard interest rate being charged during the time the loan is being used. Assuming current procedures were extant the interest charged would be based on the cost of money to the Federal Financing Bank on the day of each individual advance of funds, plus an administrative fee.

The purposes for which FMS loans are made do not include the rollover of debts. While the prohibition of such possible use of a loan is not normally stated specifically in the loan agreement, our general policy has been to refuse to authorize the use of FMS loans for this purpose. Any exception which might be made would require extraordinarily strong justification, would apply only to debts arising from prior military purchases, and would be granted only after full interagency consultation, including the Departments of Treasury, Defense and State, and the Office of Management and Budget.

Question 26. The Note Regarding Economic and Military Cooperation provides for $75 million in AID housing loans or loan guarantees. Who would be the principal recipients of such loans or loan guarantees in Panama? Would they be government corporations or private firms? If private firms, which firms would be the principal borrowers? Identify the principal stockholders or owners of each.

Answer. The Note Regarding Economic and Military Cooperation provides for $75 million in AID Housing Guarantees only. The principal Panamanian beneficiaries would be family groups with incomes below the median level. Funds from the U.S. private sector are channelled through the National Bank of Panama or the National Housing Bank which are both government corporations. These in turn make the funds available to housing cooperatives or other government agencies involved in housing construction or the provision of sites and services to the target group.

Question 27. What repayment terms might be typical of the housing loan guarantees? How long a term? At what interest rate? How will that interest rate compare with the expected rate of inflation? Could the housing loan funds be used to rollover existing debt? Would there be any prohibition on such use?

Answer. Typical terms for housing loans generally include repayment periods of from 20 to 25 years with a five year grace period at prevailing market rates, which have been running at around 9 percent. These rates compare favorably with current and projected inflation rates of between 6 and 7 percent. Housing loan funds must be utilized for the purposes intended and are additive to existing government housing programs. This set of circumstances precludes the utilization of housing loans for debt rollover purposes.

Question 28. The Note Regarding Economic and Military Cooperation provides for $20 million in Overseas Private Investment Corporation loans or loan guarantees to the Panamanian Development Bank. COFINA. What repayment terms might be typical of the loans guaranteed by OPIC? How long a term? At what interest rate? How will that interest rate compare with the expected rate of inflation? Could these funds or loan guarantees be used to rollover existing debt? Would there be any prohibition on such use?

Answer. Loans guaranteed by OPIC generally have a term of 10 to 15 years. OPIC charges a guarantee fee of 2¼ to 3 percent, or an average of 2¾ percent.

The interest rate on guaranteed loans is market-related and will reflect market factors, including, inter alia, the rate of inflation.

Question 29. Certainly, a very dangerous precedent might be set by permitting the loans of large international commercial banks to be guaranteed by the United States when such loans are made to non-producing entities, such as the central bank or development bank of a debt-ridden third world country. Please state whether the Overseas Private Investment Corporation has ever before guaranteed interbank loan transactions of the type contemplated in the Note Regarding Economic and Military Cooperation.

Answer. OPIC has in the past financed regional private development corporations, so in that sense the proposed Panama program conforms to past OPIC transactions. The proposed program will be the first time that OPIC has guaranteed borrowings of U.S. private capital by a public development bank.

We anticipate that loans guaranteed by OPIC will be lent on by COFINA to productive enterprises in Panama. We do not believe that inserting COFINA as an intermediary between the guaranteed lender and the ultimate borrower will constitute a dangerous precedent for OPIC.

Question 30. Excluding loans to the Government of Panama and interbank loan transactions, what is the extent of U.S. overseas private investment in the Republic of Panama? What percentage of total U.S. OPIC is in Panama? How does that figure compare with the 8.5% exposure of OPIC in Panama which would result should this executive agreement be implemented? How would that ratio of investment to exposure compare with similar ratios in other countries in which loans have been guaranteed by OPIC?

Answer. (*a*) The total U.S. overseas private investment in Panama is $2 billion.

(*b*) OPIC does not at present have any loan guarantees outstanding in Panama. OPIC does, however, have one outstanding loan for $1.1 million in Panama. OPIC's loans and guarantees in Panama are approximately 0.5% of OPIC's global loan and guarantee portfolio of $215 million.

(*c*) If the executive agreement were implemented. OPIC's loan and guarantee exposure in Panama would increase to 9 percent of the global total.

(*d*) As compared to other countries, Panama's representation in OPIC's portfolio is now very small. If the agreement were implemented, Panama would have the third largest place in OPIC's finance portfolio, following Indonesia and Korea.

Question 31. The Panama Canal Company was created by statute, is therefore a creature of Congress, and is subject to the Government Corporation Control Act (31 U.S.C. 849). Its sole stockholder is the Secretary of the Army, representing the people of the United States. Please describe for the Committee the plans of the Department of State for the Panama Canal Company should those proposed treaties be ratified. Does Panama understand that Congress could refuse to create a new Panama Canal Commission in the manner specified in the proposed Panama Canal Treaty?

Answer. The recommendations of the Executive Branch with respect to the organization of the Panama Canal Commission will be included in draft legislation submitted to Congress for implementation of the new treaties. Panama clearly understands that the Treaty reserves to U.S. domestic law very broad discretion concerning the organization and structure of the new Canal Commission. In theory, the Congress could, of course, at any time enact legislation contrary to the terms of this or any other treaty and such subsequent, inconsistent legislation would prevail over the treaty terms as a matter of U.S. domestic law. To the extent that such legislation required the U.S. to breach its international obligations under the Treaty, the U.S. would be in violation of international law; based on past experience, we are confident that the Congress would endeavor to legislate in a manner consistent with the international obligations of the U.S.

Question 32. Does the Government of Panama understand that the Congress may elect to transfer the $319 million debt to, or unrecovered equity of, the United States from the Panama Canal Company to the proposed Panama Canal Commission?

Answer. The $319 million you refer to is not a "debt", but a measure, for specific accounting purposes, of the equity of the United States in the Panama Canal. The definition of its equity in the Canal is a function of internal U.S. accountancy and rests wholly within U.S. discretion. This subject has not been specifically discussed with the Government of Panama but we assume Panama has no particular interest in internal U.S. accounting practices in this regard.

CHAIRMAN'S COMMENT.—The $319 million is a liability of the Panama Canal Company. The sum ought to become a liability of the proposed Panama Canal Commission. If the Panamanian's have no interest in the matter now, they soon will.

Question 33. Would such transfer be consistent with Article XIII of the Panama Canal Treaty?

Answer. Article XIII does not deal with the right of the United States to define its equity in the Canal. That is wholly a right of Canal management which is vested in the United States under Article III.

Question 34. At present, the Panama Canal Company is authorized by P.L. 86–200 (73 Statutes at Large 428) to borrow $10 million and, pursuant to Section 104 of the Corporation Control Act, the Company is authorized to make contracts obligating the Company without regard to fiscal year constraints. What sort of borrowing authority would the Panama Canal Commission, as a wholly owned U.S.G. corporation, be permitted? What does the Department of State recommend?

Answer. According to Article III, the U.S. has the right to manage, operate and maintain the Canal. Inherent in this right is the power to legislate regarding the financial structure of the new Canal operation. Therefore, the financial aspects of Canal operations will be molded by implementing legislation. To cover the possibility of emergency or unusual traffic conditions, the implementing legislation would presumably grant the Commission the authority for prudent management through continuation of the borrowing authority now possessed by the Panama Canal Company under Section 71 of Title 2 of the Canal Zone Code.

Question 35. Assuming that the new Panama Canal Commission runs up some debts—and I think that is going to be a pretty fair assumption—what is going to happen to these liabilities at the end of the term of the Panama Canal treaties? Will it be another case of the United States taxpayers getting all the liabilities and none of the assets?

Answer. The Panama Canal Treaty grants the United States all the rights necessary to operate the Panama Canal which will be exercised through a U.S. Government agency to be known as the Panama Canal Commission. The Treaty recognizes that the Commission will be constituted by and operate in accordance with U.S. law. Therefore, Panama has agreed that the U.S. may, in its own discretion, set tolls and manage the enterprise in the manner in which it sees fit.

This concept was one that the U.S. negotiators regarded as essential and fought hard to obtain. Since the U.S. has plenary authority to manage the Canal, it necessarily follows that Panama will not be saddled with deficits which might be incurred as a result of our policies of Canal operation unless it subsequently agrees to commit itself to assume some indebtedness in connection with the Canal. Under this arrangement, then, it will be up to the U.S. to determine how the operation is to be managed to avoid indebtedness in 1999 or to satisfy that indebtedness in an appropriate manner. It is contemplated that the Commission, by adjusting tolls to meet operating costs, will be a self-sustaining entity. The Canal will transfer to Panama in 2000, but not the Canal Commission; as a U.S. agency, its affairs will be closed out in accordance with U.S. law.

Question 36. How would Article XIII of the proposed Panama Canal Treaty affect winding-up the affairs of the proposed Panama Canal Commission at the end of the term of the proposed Panama Canal Treaty? If there are debts, who will pay?

Answer. In 1999, the payments under Article XIII(4) (a) and (b) of the Treaty will have to be made to the extent that there are gross operating revenues in that year sufficient to cover them. However, except to the extent that the net surplus of revenues over expenditures in 1999 was sufficient to cover the entire accumulated unpaid balance from prior years, that balance of 4(c) payments would be canceled; no additional payments to Panama would be required.

Question 37. Please describe the composition of the board of directors of this new Commission the Department of State contemplates asking Congress to set up should the treaties be ratified. Who will be the chief executive officer of the new Commission? Under the proposal of the Department of State, would not control of Canal operations tend to shift from the Department of Defense to the Department of State?

Answer. (*a*) Article III(3) of the new Panama Canal Treaty provides that the Board of Directors will be composed of nine members, five of whom shall be nationals of the U.S., and four of whom shall be Panamanian nationals. The method of selecting the U.S. directors is left up to the internal processes of the U.S.

(*b*) The chief executive officer of the new Commission will be the "administrator". The administrator will be a U.S. citizen through Decemebr 31, 1989. Thereafter the administrator will be a Panamanian with a U.S. citizen as deputy administrator. In either case, however, the administrator will be an employee of the U.S.G. and subject exclusively to USG direction.

(*c*) The matter of the organization of the Canal Commission is presently under review.

We do not anticipate that control of Canal operations will tend to shift to the Department of State, and we believe the Department of Defense will continue to have a major role. The Congress will have the opportunity, in its enactment of legislation implementing the Panama treaties, to make specific provision for a number of organizational arrangements regarding the Panama Canal Commission.

Question 38. I note that Panama, under the proposed Panama Canal Treaties, would be promised a $10 million kicker in every profitable year and, moreover, that this right to a $10 million kicker would be cumulative so that if the $10 million were not paid in one year, it might be recovered in the next as part of a $20 million kicker payment. So profitability, or the appearance of profitability, of the new Commission will be especially important to Panama, but if the Commission is given borrowing authority, who will determine what years are profitable and what years are not profitable? Who is going to have control of this bookkeeping operation? Don't you see some risk that the Panamanians might seek to assert that the Commission has been profitable when it has, in fact, not been profitable? Would the issue be submitted to arbitration? Who would arbitrate?

Answer. It is understood by the Parties that the "expenditures" referred to in Article XIII (4) (c) of the PCT would include all actual costs of operation and maintenance of the Canal. These costs would include the payments to be made to Panama by the Commission pursuant to the other provisions of the Treaty, funding for plant replacement, capital, improvement, and repayment of borrowed funds. The determination of any excess of revenues over costs will be made by the Board of Directors which will have a majority of American members. It will aso authorize any use of the borrowing authority. The specific accounting system to be utilized by the Commission is to be established by the U.S. The accounting system will be established in such a manner that it will be apparent from looking at the books at the end of the year whether such a surplus exists. Article XIV of the new Treaty provides for settlement for any dispute that may arise.

Question 39. One of the previous witnesses before the Committee testified that he understood that former Ambassador Linowitz had informally advised the Panamanian negotiators that they needn't worry about paying back these long-term loans which would be provided or guaranteed under the Note Regarding Economic and Military Cooperation. In fact, there have been reports that Ambassador Linowitz may have testified to that effect before the Senate Committee on Intelligence. Have you heard such reports, and is there any basis for them in fact? (Please consult records available to you at the Department of State to provide a full response in the event you have no personal knowledge of the information sought.)

Question 40. Have you heard any report that any one of our negotiators, or any person purporting to act or appearing to act on behalf of the United States, ever advised the Panamanians that it would not be necessary to repay these loans? Is there any basis for these reports in fact? (Please consult records available to you at the Department of State to provide a full response in the event you have no personal knowledge of the information sought.)

Answer. Ambassador Linowitz never advised the Panamanian negotiators that the long-term loans to be provided or guaranteed under the Note Regarding Economic and Military Cooperation would not have to be repaid. The question as to the terms of repayment arose early in Mr. Cooper's conversations with Panamanian negotiators. U.S. officials informed the Panamanians that any long-term loans or guarantees would have to be subject to the normal criteria and procedures of each agency involved, would be implemented through existing programs and would not be offered on concessional terms. Repayment would certainly be expected. The Panamanian negotiators understood these conditions.

Question 41. Please briefly describe the amounts and kinds of U.S. foreign aid extended to the Republic of Panama during fiscal years 1977, 1976, 1975, and 1974.

Answer. U.S. economic assistance to Panama has been largely channeled through the Agency for International Development.

The purpose of the Panama-A.I.D. Program is to alleviate those constraints which prevent the rural poor from full participation in the economy. In education, A.I.D. resources are geared to develop a practical basic curriculum and technical training system through the Ministry of Health so that health facilities are more accessible. This effort includes the construction and organization of rural health centers, the training of paramedical personnel and the construction and development of sanitation facilities and potable water systems. In agriculture, A.I.D.'s efforts include development of market towns, cooperatives, marketing facilities and infrastructure, and rural regional integrated development. A.I.D. is also financing low income housing at a number of locations throughout Panama. Total economic assistance (in U.S. $ millions) through FY 1976, the most recent period for which statistics are available include the following:

[In U.S. dollars in millions]

Fiscal year 1974:	
Loans	8.3
Grants	19.6
Total	27.9
Fiscal year 1975:	
Loans	6.7
Grants	14.5
Total	21.2
Fiscal year 1976:	
Loans	21.0
Grants	3.7
Total	24.7

Military assistance (in million of dollars) during the same period comes to the following totals:

Fiscal year 1974:	
Loans	0
Grants	0. 9
Total	0. 9
Fiscal year 1975:	
Loans	0
Grants	0. 6
Total	0. 6
Fiscal year 1976:	
Loans	0. 5
Grants	0. 7
Total	1. 2

Question 42. Please briefly describe the amounts and kinds of U.S. foreign aid proposed to be extended to the Republic of Panama during fiscal year 1978.

Answer. For fiscal year 1978 total economic assistance channeled through A.I.D. is estimated at $23.1 million. The basic thrust of the economic assistance program remains essentially as described above, except that two additional development loans amounting to $20 million are contemplated for a Watershed Management project and a Rural Development program. Grants amounting to $1.2 million for population planning and training activities are also contemplated. A PL 480 Title II Grant program of $1.9 million is also programmed.

Chairman's General Comment on Responses of the Department of State to Questions Submitted for the Record

Although the answers of the Department of State are in some respects useful to the subcommittee, I cannot help but note for the record that in many instances the Department appears to have done its level best to provide as little information as is possible without failing to respond entirely. This approach unfortunately typifies the attitude at the Department of State which seems to have prevailed throughout the negotiation of the proposed Panama Canal treaties and the ensuing debate of the treaties. Frankly, I am of the opinion that the treaties are such a bad bargain for the United States and that the negotiations for the treaties were handled so ineptly that the Department of State must feel some embarrassment regarding the entire matter and therefore must feel some need to be less than fully candid with the Congress in discussing the treaties and the circumstances surrounding their negotiation.

STATEMENT OF
LELAND L. RIGGS, JR.
FOR THE USE OF THE
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Leland L. Riggs, Jr., being duly sworn, deposes and says as follows:

I, Leland L. Riggs, Jr., am a retired Special Agent in Charge of the United States Drug Enforcement Administration. I am familiar with facts involving narcotics intelligence collection in Central America.

I first became a criminal investigator for the U.S. Bureau of Customs in January, 1964, after having spent 8½ years as a highway patrolman. I was first assigned by the Bureau of Customs to duties in California where I conducted narcotics smuggling investigations for a period of 6½ years. Thereafter, I was promoted from Customs Special Agent to Senior Customs Representative and was transferred to Mexico City, Mexico. Inasmuch as I am bilingual and speak Spanish, my assignment to Mexico was deemed to be advantageous to the agency.

While assigned to Mexico City, I had sole responsibility for Customs narcotics intelligence gathering and for conducting follow-up investigations forwarded to me by our domestic offices of investigation. My area of responsibility included not only the Republic of Mexico but additionally all of Latin America. However, 95% of my investigative time concerned either Mexico or the Republic of Panama.

During the time I was in Mexico in 1970 and 1971, I conducted several investigations in Panama. Subsequently, in June of 1972, I was appointed Customs Attache and instructed to establish an office in the American Embassy in Panama City, Panama. This occurred during the period when the entire Bureau of Narcotics and Dangerous Drugs agents force had been expelled persona non grata from Panama. I served as Customs Attache until July 1, 1973, at which time the Drug Enforcement Administration was formed and I then also assumed command of the Panamanian functions of the Bureau of Narcotics and Dangerous Drugs when the Bureau of Customs narcotics functions were merged with those of the BNDD. In short, I became the Special Agent in Charge of the combined office.

I left Panama on June 17, 1974, to become the Special Agent in Charge of the DEA District Office in Brownsville, Texas. Thereafter while on temporary assignment as Project Manager for a special DEA operation in Colombia directed against clandestine cocaine processing laboratories in Colombia, on November 30, 1975, I was attacked, beaten, and pushed off a retaining wall to a street below and suffered several fractured vertebrae, a broken ankle, kidney damage, and assorted cuts and bruises. The DEA subsequently retired me on August 24, 1976, for medical disability reasons.

When I first began conducting investigations in Panama, the BNDD Agent in Charge advised me that we had to be very careful about informing Panamanian government officials concerning our work since they were corrupt and also involved in narcotics trafficking. I soon learned from personal experience that this advice was sound.

During September, 1970, I traveled to Panama to conduct a follow-up investigation regarding a Yolando Sarmiento case involving shipments of heroin from Panama to New York. Although I do not have presently in my possession intelligence reports prepared by me at that time, I do recall certain aspects of the case. Yolanda Sarmiento reportedly was smuggling approximately 100 pounds of heroin monthly into the United States. This heroin was reported to be stored in the Colon Free Zone in the Republic of Panama.

The Colon Free Zone is a large, fenced-in, heavily guarded section of Colon, Panama, on the Atlantic side where duty-free items are displayed in numerous stores for purchase by persons and businesses based primarily in South America. I was advised by U.S. Canal Zone officials and a confidential source that the Guardia Nacional controlled and guarded this enclosed area. I later did manage to gain entrance with a U.S. Canal Zone official; however, we were only permitted to go into the showcase areas of the various stores. The Colon Free Zone is entered at a gate guarded by uniformed members of the Guardia Nacional. Although the Government of Panama does have a Customs Office and there are Panamanian Customs Agents, Panamanian Customs does not have responsibility for control of the Free Zone.

During 1970, United States Customs Agents in New York were able to effect the arrest of Yolanda Sarmiento, Emilio Diaz Gonzales, and others; however, Yolanda Sarmiento was released on bail, subsequently fled the country, and became a fugitive in Argentina. As best I recall, Emilio Diaz Gonzales escaped from prison in New York and is believed also to have fled the country.

My efforts to continue a follow-up investigation of the Sarmiento case were essentially unsuccessful because of the problems inherent in free movement within the Colon Free Zone resulting from the control of the Free Zone by the Guardia Nacional of the Government of Panama.

During my trips to Panama, I became aware of a BNDD investigation concerning the Panamanian chief air controller, Juaquin Him Gonzales. Juaquin Him was reportedly directing heroin from Panama into Texas and using his official capacity in the Government of Panama to facilitate the movement of this heroin. He was subsequently indicted by a U.S. Grand Jury in Texas and was arrested when he entered the U.S. Canal Zone to attend a softball game. Juaquin Him was tried and convicted for facilitating the transportation of narcotics into the United States.

I understand that the arrest of Juaquin Him caused considerable dissension between the Ambassador and the U.S. narcotics agents in Panama. I experienced similar problems in connection with the Raphael Richard-Moises Torrijos case.

I learned of the Richard-Torrijos case after my assignment as the Customs Attache to the American Embassy in Panama. In fact, I became directly involved in the investigation concerning Moises Torrijos, now Panamanian Ambassador to Spain, and Raphael Richard Gonzales, the son of the then-Panamanian Ambassador to Taiwan. Richard was arrested on the evening of July 8, 1971, at John F. Kennedy Airport in New York in possession of 151 pounds of heroin. Immediately prior to his arrest, he claimed diplomatic immunity and asserted that his suitcase could not be opened and searched due to his diplomatic passport. A U.S. customs inspector advised him that he was accredited as a diplomat in Taiwan, not in the United States, and therefore had no diplomatic status in the United States. Also arrested that evening was Nicolas Polanco, a reported chauffeur-bodyguard of Moises Torrijos. Moises Torrijos was then the Panamanian Ambassador to Argentina, and he is the brother of Dictator Omar Torrijos.

The day following the Richard arrest, Guillermo Alfonso Gonzales was also arrested upon his arrival in New York City from Panama for the purpose of accepting delivery of the heroin Richard had attempted to bring into the country. Others arrested the same day were Jose Francisco Oscar San Martino, an Angentine, and Cesar and Amarico Altanirano, both Panamanians.

Subsequent investigations of the same case led to the indictment of Moises Torrijos by a Grand Jury of the U.S. District Court for the Eastern District of New York. Torrijos was indicted as a co-conspirator with the above-mentioned defendants. Thereafter, a warrant for the arrest of Moises Torrijos was issued by the U.S. Court for the Eastern District of New York. On the basis of the evidence of a warrant, I was instructed to be on the alert to effect an arrest in the event Moises Torrijos traveled from Spain through the U.S.-controlled Panama Canal Zone.

During either late 1972 or early 1973, I was advised that Moises Torrijos, accompanied by his wife, was traveling from Spain to Panama on a passenger vessel. Subsequent information showed that the vessel would dock in Cristobal, Panama, within the U.S.-controlled Panama Canal Zone. Arrangements were therefore made to effect the arrest of Moises Torrijos in the U.S. territory upon his arrival. However, Moises Torrijos was obviously informed of his impending arrest and departed the vessel at Caracas, Venezuela, where he flew by commercial airliner to Tocumen Airport within the Republic of Panama. When the vessel arrived, only Mrs. Moises Torrijos disembarked. Inasmuch as the only parties aware of the planned arrest of Moises Torrijos other than BNDD were the U.S. Department of State and the Central Intelligence Agency, Moises Torrijos could only have been alerted to the planned arrest by United States authorities.

During my tenure as Special Agent in Charge of Drug Enforcement, I did not have another opportunity to effect the arrest of Moises Torrijos. In fact, during my tour of duty as Customs Attache before assuming command of the combined Customs and BNDD forces, I was advised that Washington officials of the Bureau of Narcotics and Dangerous Drugs traveled to Panama, met with Colonel Noriega, Chief of Panamanian Intelligence, and with General Omar Torrijos, and alerted them both to the existence of an indictment and warrant concerning the General's brother, Moises. To the best of my knowledge, the warrant for the arrest of Moises Torrijos is still in existence and presumably, if he touches U.S. soil, he is still liable to arrest.

During my tour of duty in Panama, several cases which were presented to the Panamanian enforcement officials were mysteriously terminated or not given proper attention. Due to my knowledge of their involvement, many cases were not presented to Panamanian enforcement officials so as not to compromise my investigation. Finally, I did not feel that I had the full support of the diplomatic community in the pursuit of my assigned mission in Panama, especially in those matters which tended to implicate officials of the Government of Panama. In any event, due to the eventual assignment of a State Department employee as the narcotics coordinator, I was relegated to a secondary position. Similar conditions now exist in most embassies where Drug Enforcement personnel are assigned, and in almost all cases, the Department of State employee has no narcotics training nor expertise. It is my opinion that Department of State personnel are placed in the position of narcotics coordinator primarily to insulate and protect the activities of the Department of State from any so-called disrupting incident regarding narcotics enforcement directed against an official of the host government.

Given under my hand and seal on this the first day of December, 1977, in the City of Washington, District of Columbia.

Leland L Riggs Jr (L.S.)
Leland L. Riggs, Jr.

NOTARIZATION:

Subscribed and sworn to by
Leland L. Riggs, Jr.
before me this first day of December, 1977

Donna E. Wood
My Commission Expires
1-1-82

STATEMENT OF
LELAND L. RIGGS, JR.
FOR THE USE OF THE
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Leland L. Riggs, Jr., being duly sworn, deposes and says:

On approximately November 21, 1977, I was called at my residence in Texas by Mr. Bill Link, Special Assistant to Mr. Peter Bensinger, the Administrator of the Drug Enforcement Administration. Mr. Link advised me that the Attorney General's office was reviewing investigative reports of mine written while I was stationed in Panama and that within a few minutes the Attorney General's office would call me and that I was free to discuss these reports or answer any questions asked of me. A few minutes later, a Mr. Bushong called and stated that he was reading a report written by me concerning plans to attempt the arrest of Moises Torrijos in the U.S. Canal Zone. Mr. Bushong stated that my report advised that Moises Torrijos, who was enroute from Spain by vessel to the Panama Canal Zone, had suddenly disembarked in Caracas, Venezuela, and was flown to Tocumen Airport in the Republic of Panama where I had no jurisdiction, leaving his wife on board the vessel to travel to the Canal Zone. Mr. Bushong asked for my opinion as to how Moises Torrijos was advised of his impending arrest which caused him to change his travel plans. I stated that I felt the Government of Panama, and hence Torrijos, was advised of the planned arrest either by the United States Department of State or by the Central Intelligence Agency.

Given under my hand and seal on this the first day of December, 1977, in the City of Washington, District of Columbia.

Leland L. Riggs Jr (L.S.)
Leland L. Riggs, Jr.

NOTARIZATION:

Subscribed and sworn to by
Leland L. Riggs, Jr.
before me this first day of December, 1977

Donna E. Wood
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